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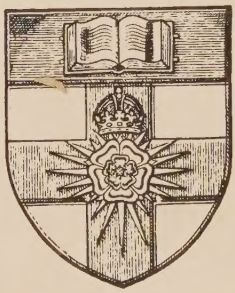

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ERRATA

Page 554: *Dun* v. *Dun.* Owing to an error in the printed judgment, the year in which the testator made his will is stated to be 1919, whereas this should read 1939.

Page 726, Appearances: For Nigel Bowen *read Nigel Bowen Q.C.*

Page 915, 13 lines from bottom of page: *read* " trial under rule 1? "

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THE
WEEKLY LAW REPORTS
Volume II

Containing those cases which are intended to be included in The Law Reports.

[CHANCERY DIVISION.]

In re BACHARACH'S WILL TRUSTS. MINDEN *v.* BACHARACH AND OTHERS.

1958
Nov. 19, 26.

Vaisey J.

[1958 B. 2328.]

Will—Construction—Omission—Trust to divide income into four equal parts "one part to each of my children and two parts to my "wife . . . as shall survive me until the children attain the age of "23 years . . . "—Trusts of half of residuary estate for testator's children and their issue—Absolute gift of whole estate to wife on failure of testator's issue—Extent of wife's interest in her two equal fourth shares—Power of court to transpose words of will.

A testator, after directing that his business should not be sold without his wife's consent, devised and bequeathed his residuary estate on trust "to pay and apply the annual income arising there-"from to be divided into four equal parts one part to each of my "children and two parts to my wife N. . . . as shall survive me until "the children attain the age of 23 years and if more than one child "in equal shares and if and when each of my said children shall "attain the age of 23 upon trust to pay and apply one quarter of "my residuary estate to such child for his or her own use and "benefit absolutely but if only one of my said children shall "survive me and shall live to attain the age of 23 years then to "pay and apply the half of my residuary estate to such child for "his or her use and benefit absolutely." The will also created trusts of half of the residuary estate for the testator's issue and, on failure of his issue, a gift to the wife of his whole estate absolutely.

On the hearing of a summons taken out to ascertain the extent of the wife's interest under the will:—

Held, (1) that, though the wording of the will was confused through something having been inadvertently omitted or inserted, or through the words having been disarranged, it was clear in the context that the testator's intention was that the wife was to take two of the four shares absolutely under an indefinite gift of income.

In re Smith [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708 considered.

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(2) That in such circumstances it was legitimate to rearrange the language of the will by a transposition of the words so that it should read "two parts to my wife N." before and not after "one "part to each of my children"; such a transposition made in order to produce sense being allowable in the case of a will as in the case of a statute.

Love v. *Norman Wright (Builders) Ltd.* [1944] 1 K.B. 484; 60 T.L.R. 349; [1944] 1 All E.R. 618 applied.

(3) That, accordingly, the wife took a one-half share of the residue.

In re Smith (supra); *In re Follett* [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22, and *In re Whitrick* [1957] 1 W.L.R. 884; [1957] 2 All E.R. 467 applied.

Per curiam: If other re-arrangements of the words could have been suggested as producing an equally reasonable and probable disposition of the estate, an intestacy would have resulted, as the court would have no power to choose between alternatives in such a case.

ADJOURNED SUMMONS.

The following statement of the facts is taken in substance from the judgment.

The plaintiff was the sole executor and trustee of the will, dated November 14, 1956, of the testator, Leo Bacharach, who died on December 31, 1957, leaving a widow, the defendant, Nora Bacharach, and two children, issue of a former marriage, the defendants, Robin Michael Bacharach, and Evelyn Clair Bacharach, of whom the former was just of age and the latter still an infant. His will was proved by the plaintiff on April 3, 1958, and the net value of his estate was sworn as being upwards of £17,000.

After bequeathing certain pecuniary legacies, the testator devised and bequeathed his residuary estate on trust for sale subject to a direction that his business of a leather factor's merchant should not be sold without his wife's consent and to stand possessed of the proceeds and resulting investments and property, called his residuary estate, on trust "to pay and apply "the annual income arising therefrom to be divided into four "equal parts one part to each of my children and two parts to "my wife Nora . . . as shall survive me until the children attain "the age of 23 years and if more than one child in equal shares "and if and when each of my said children shall attain the age "of twenty-three upon trust to pay and apply one quarter of my "residuary estate to such child for his or her own use and benefit "absolutely but if only one of my said children shall survive me "and shall live to attain the age of twenty-three years then to "pay and apply the half of my residuary estate to such child for "his or her use and benefit absolutely."

Then followed two provisos. The first was that if either of his children should die in his lifetime or before attaining the age of twenty-three leaving a child or children who should survive him or her such child [*sic*] should take and if more than one equally between them the share in his residuary estate which his

her or their [*sic*] parent would have taken if such parent had survived the testator and lived to attain a vested interest under his will. The second proviso was that if both of the testator's said children should die in his lifetime without leaving issue his entire estate consisting of the four shares before mentioned should be for the use and benefit of the testator's said wife.

By this summons the trustee asked, inter alia, whether, on the true construction of the will, two equal fourth parts of the residuary estate were held on trust for the widow absolutely; or to pay the income of it to her during her life; or to pay it her until both the son and the daughter attained the age of 23 years; or to pay it to her until one of them attained that age.

G. M. Parbury for the trustee.
A. C. Sparrow for the widow.
A. A. Baden Fuller for the children.

Case cited in argument not referred to in the judgment: *Hudson* v. *Bryant.**

Cur. adv. vult.

November 26. VAISEY J. stated the facts and continued as follows: It is obvious that the passage of the will which I have quoted consists, especially at the beginning of the passage, of an extraordinary jumble of words for which it is difficult to account, for the probate includes a photograph of the original will which was a neatly typewritten document bearing every superficial indication of having been carefully prepared for signature.

This summons concerns the two equal fourth shares in which the widow takes an interest under the will, and the question is; what interest? Several suggestions are made such as (1) that the widow takes the two shares absolutely; (2) that she takes only a life interest in the income, and (3) that she takes such income only until both the testator's children attain, or, alternatively, until one of them attains the age of 23 years. If either of suggestions (2) or (3) is adopted, the further question arises as to the destination of the two shares when the widow's interest in them comes to an end.

There is evidently something very wrong about the wording of the will. Something has been inadvertently omitted, or inadvertently inserted, or the words have been disarranged. The question is whether I can discover from the words as they stand what the testator's meaning was without speculating any further than was held to be permissible in *In re Smith*,[1] for I have, of course, no power to rectify the document, or to do anything but construe it as it stands.

* (1845) 1 Collyer 681.

[1] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.

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I have a strong impression amounting, I think, to a conviction, that the widow was intended to take the two shares absolutely under an indefinite gift of income. That view seems to me to be supported by the circumstance that her consent is required to the sale of the testator's business, and by the absolute gift to her of the whole estate on failure of the testator's issue, and by the ingenious suggestion of the widow's counsel that the words "two parts to my wife Nora" should have preceded instead of following the words "one part to each of my children." If such a re-arrangement were made, the difficulty would disappear, for everything which came after the reference, in its new place, to the widow's two parts would be dealing appropriately and naturally with the children's two parts. I am not aware that the expedient of shuffling the words in a will to make them intelligible has ever been resorted to, but I do not see why it should not, in a proper case, be permitted.

I have been referred to *Love* v. *Norman Wright (Builders) Ltd.*,[2] where the words of a statute were transposed in order to make them make sense, or better sense, and, if this could be done in the case of a statute, it must surely be allowable in the case of a will. In holding that the widow takes her two shares absolutely, I am relying on *In re Smith*,[3] *In re Follett*[4] and *In re Whitrick*.[5] If other re-arrangements of the words could have been suggested as producing an equally reasonable and probable disposition of the testator's estate, I should have held that an intestacy must result, for I would have no power to choose between alternatives in such a case.

I will declare that the construction of the will is as I have indicated.

Declaration accordingly.

Solicitors: *A. & G. Tooth; Hopwood & Co.*

K. R. A. H.

[2] [1944] 1 K.B. 484, 489; [1944] 60 T.L.R. 349, 350; [1944] 1 All E.R. 618, 620.

[3] [1948] Ch. 49; [1948] 63 T.L.R. 608; [1947] 2 All E.R. 708.

[4] [1955] 1 W.L.R. 429; [1955] 2 All E.R. 22.

[5] [1957] 1 W.L.R. 884; [1957] 2 All E.R. 467.

[PRIVY COUNCIL.]

GOKULDAS RATANJI MANDAVIA . . . APPELLANT;

AND

COMMISSIONER OF INCOME TAX . . RESPONDENT.

J. C.*

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ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Revenue — Income tax — Assessment — Eastern Africa — Made before expiry of time for furnishing return—Ultra vires and void—East African Income Tax (Management) Act, 1952, *ss.* 59 (1), 71 (1), 72. *Eastern Africa (Kenya)—Income tax.*

By section 59 of the East African Income Tax (Management) Act, 1952: "(1) The commissioner may, by notice in writing, "require any person to furnish him within a reasonable time, not "being less than thirty days from the date of service of such notice, "with a return of income . . . "

By section 71: "(1) The commissioner shall proceed to assess "every person chargeable with tax as soon as may be after the "expiration of the time allowed to such person for the delivery of "his return."

By section 72: "Where it appears to the commissioner that any "person liable to tax has not been assessed . . . the commissioner "may . . . assess such person at such amount . . . as, according to "his judgment, ought to have been charged . . . "

On May 26, 1953, the appellant, a resident in Kenya, was for the first time served with a notice under section 59 (1) of the Act of 1952 requiring him to furnish returns of his income for the years of assessment 1943 to 1953. He was then in England and wrote to the commissioner asking for time until he returned to Kenya towards the end of July. In those circumstances the commissioner on or before June 18 made assessments on the appellant under section 72 of the Act of 1952 for the years 1943 to 1951 inclusive on the basis of figures already submitted. The appellant contended that section 72 did not apply until the machinery under section 71 had been put into operation, and that the assessments were ultra vires and void in that they were made before the "time allowed" by section 71—which was admittedly the 30 days provided by section 59 (1)—had expired:—

Held, that section 71 was providing how all original assessments were to be made, whereas section 72 was concerned with the reopening of cases which had been settled under the normal procedure. Having regard to the wording of section 71, it was necessary to restrict the words as to assessing for the first time in section 72 to cases in which, the machinery of section 59 (1) having been operated, no assessment had been made. Accordingly, before making the assessments on the appellant the "time allowed" under section 71 had to elapse, and since it did not the assessments must be set aside.

Order of the Court of Appeal for Eastern Africa (1956) 23 E.A.C.A. 303 reversed.

APPEAL (No. 7 of 1957) from a judgment of the Court of Appeal for Eastern Africa (September 28, 1956) which varied, on

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* *Present*: LORD TUCKER, LORD SOMERVELL OF HARROW and LORD DENNING.

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the appellant's appeal, a decree of the Supreme Court of Kenya (March 6, 1956) which had dismissed the appellant's appeal against assessments to income tax for the years 1943 to 1951, subject to remitting treble additional tax for the year of assessment 1951.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: Over the earlier years in issue in this case the Kenya Income Tax Ordinance, 1940, was in force. As from January 1, 1951, that Ordinance was replaced by the East African Income Tax (Management) Act, 1952. It was common ground that there was no relevant difference so far as the present case was concerned and the Board were referred, as were the courts below, to the sections of the 1952 Act.

It is convenient to set out sections 40 (1), (2) and (3), 59 (1) and (3), 71 and 72 before coming to the facts.

Section 40 of the Act provided: "(1) Any person who—(*a*) "makes default in furnishing a return, or fails to give notice "to the commissioner as required by the provisions of section 59, "in respect of any year of income shall be chargeable for such "year of income with treble the amount of tax for which he is "liable for that year under the provisions of sections 36 to 39 "inclusive; or (*b*) omits from his return for any year of income "any amount which should have been included therein shall be "chargeable with an amount of tax equal to treble the difference "between the tax as calculated in respect of the total income "returned by him and the tax properly chargeable in respect of "his total income as determined after including the amounts "omitted, and shall be required to pay such amount of tax in "addition to the tax properly chargeable in respect of his true "total income. (2) If the commissioner is satisfied that the "default in rendering the return or any such omission was not "due to any fraud, or gross or wilful neglect, he shall remit the "whole of the said treble tax and in any other case may remit "such part or all of the said treble tax as he may think fit. "(3) The additional amounts of tax for which provision is made "under this section shall be chargeable in cases where tax has "been assessed by the commissioner under the provisions of "section 72 as well as in cases where such income or any part "thereof is determined from returns furnished."

Section 59 (1) of the Act provided: "The commissioner may, "by notice in writing, require any person to furnish him within "a reasonable time, not being less than thirty days from the "date of service of such notice, with a return of income and "such particulars as may be required for the purposes of this Act "with respect to the income upon which such person appears to "be chargeable."

Section 59 (3) of the Act provided: "Where any person "chargeable with tax has not furnished a return within nine "months after the end of the year of income, it shall be the duty "of every such person notwithstanding that no notice has been

"served upon such person under subsection (1) to give notice to "the commissioner before the 15th October in the year following "the year of income that he is so chargeable."

Section 71 of the Act provided: "(1) The commissioner shall "proceed to assess every person chargeable with tax as soon as "may be after the expiration of the time allowed to such person "for the delivery of his return. (2) Where a person has delivered "a return, the commissioner may—(*a*) accept the return and "make an assessment accordingly; or (*b*) if he has reasonable "ground for thinking that the return is not a true and correct "return, refuse to accept the return and, to the best of his "judgment, determine the amount of the income of the person "and assess him accordingly. (3) Where a person has not "delivered a return and the commissioner is of the opinion that "such person is liable to tax, he may, according to the best of "his judgment, determine the amount of the income of such "person, and assess him accordingly, but such assessment shall "not affect any liability otherwise incurred by such person by "reason of his failure or neglect to deliver a return."

Section 72 of the Act provided: "Where it appears to the "commissioner that any person liable to tax has not been assessed "or has been assessed at a less amount than that which ought "to have been charged, the commissioner may, within the year "of income or within seven years after the expiration thereof, "assess such person at such amount or additional amount as, "according to his judgment, ought to have been charged, and "the provisions of this Act as to notice of assessment, appeal "and other proceedings under this Act shall apply to such assess-"ment or additional assessment and to the tax charged there-"under:—Provided that (*a*) where any fraud or wilful default "has been committed by or on behalf of any person in connexion "with or in relation to tax for any year of income, the commis-"sioner may, for the purpose of making good to the revenue of "the Territories any loss of tax attributable to the fraud or "wilful default, assess that person at any time; (*b*) an objection "to the making of such assessment or additional assessment on "the ground that the time limited for the making thereof has "expired shall only be made on objection or appeal as provided "for under the provisions of this Act."

On the view which the Board took in this appeal no question as to penalties arose at present. It was therefore undesirable to deal with facts which on that issue might hereafter require consideration.

The appellant had been resident in Kenya since 1921. According to his own statement he approached the Revenue authorities in 1943. This was disputed, but it was not disputed that prior to 1953 he was not served with notices under section 59, nor did he make returns of his income. The appellant in 1950 gave oral notice to the respondent that he was chargeable in respect of 1950 and the previous eight years. As a result of that

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interview there was correspondence and information was asked for and some of it given. The machinery of the Act was not set in motion until May 26, 1953. On that day the respondent wrote asking for information and a deposit of £2,000. The letter also contained the following paragraph: "As you do not appear at "any time to have made a return of total income and claim for "allowances, I am sending under separate cover forms covering "years of assessment 1943 to 1953. These should be completed "and submitted to me along with the accounts of your profes-"sional activities and of your property dealings as set out in "preceding paragraphs."

No previous notice requiring a return having been sent, the "time allowed" within section 71 would be the minimum of 30 days in accordance with section 59 (1). The appellant was at that time in England and replied asking for time until he could get back to East Africa, which might be by the end of July. The answer to this letter was as follows:

"Ref. No. 70.

"E.A. Income Tax Department,
"Nairobi,
"15th June, 1953.

"Mr. G. R. Mandavia,
"68, St. Mark's Road,
"London, W.10.

"Dear Sir,

"I have to thank you for your letter of the 4th June, and "have noted your explanation concerning your absence from "Kenya. I have further noted that there is no prospect of your "being able to return before the end of July next. In these "circumstances, and in order that there may be no undue delay "in collection of duty, I propose to submit estimated income tax "assessments for all years for which, on the basis of the figures "which you have already submitted, you would appear to be "liable. These assessments will, of course, be subject to adjust-"ment on final agreement of liability.

"In view of the fact that you were clearly liable and must "have been aware of the fact that you were liable to taxation for "a considerable period before any approach was made to this "department, I propose to have the assessments made with the "addition of penalties. The quantum of the penalties will also "be subject to adjustment at the discretion of the commissioner "when your liability has finally been established.

"The notices of assessment will be issued to your Nairobi "address and you will presumably be advised of their receipt "and be able to give formal notice of appeal if you so desire.

"I am unable to agree that you are not in a position to pay "any deposit. On your own showing you have substantial pro-"perties in Nairobi, from which presumably you could obtain "funds. In these circumstances I would repeat my request for "a payment on account of £2,000. If this is sent to me at this

" address, it will be brought to account against the estimated " assessments which it is proposed to raise, and final payment " will be adjusted at a later date.

" Yours faithfully,

" REGIONAL COMMISSIONER."

The assessments referred to were made on or before June 18. They were post-dated June 26, but nothing turned on that. Assessments were often post-dated to allow the taxpayer more time.

The taxpayer submitted that these assessments were ultra vires and void in that they were made before the " time allowed " by section 71 had expired. This was admitted by the respondent if the power to make these assessments had to be found under that section. The respondent justified the assessments under the words of section 72, " Where it appears to the commissioner " that any person liable to tax has not been assessed . . . the " commissioner may . . . assess such person at such amount " . . . as, according to his judgment, ought to have been charged."

The assessments contained triple penalties under section 40 in addition to the tax. Being made under section 72 the proviso was relied on as justifying those assessments which related to years more than seven years from the time of the assessments.

Both courts below held that the assessments were properly made under section 72. The judge (Cram Actg. J.) remitted the triple penalties for 1951 because the appellant had given notice of his liability to tax for that year and supplied some figures. The appellant appealed. The Court of Appeal (Worley P., Sinclair V.-P. and Briggs J.A.) confirmed the assessments in respect of the tax and a penalty equal to the amount of the tax. As regards the further penalties the court remitted them to the Supreme Court for retrial by another judge.

1958. October 13, 14, 15. *Dingle Foot Q.C.* and *Peter Rowland* for the appellant.

Heyworth Talbot Q.C. and *Roderick Watson* for the respondent.

The following cases were cited in argument: *Drummond* v. *Collins* [1]; *Astor* v. *Perry*. *Duncan* v. *Adamson* [2]; *Gould* v. *Bacup Local Board* [3]; *Bedford and Cambridge Ry. Co.* v. *Stanley* [4]; *Russell* (*Inspector of Taxes*) v. *Scott* [5]; *Income Tax Commissioner* v. *Shaw, Wallace & Co.* [6]

December 1. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: The question of ultra vires is a difficult

[1] [1915] A.C. 1011; 31 T.L.R. 482.
[2] [1935] A.C. 398; 51 T.L.R. 325.
[3] (1881) 50 L.J.M.C. 44.
[4] (1862) 2 John. & Hem. 746.
[5] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1
[6] (1932) L.R. 59 I.A. 206.

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one and their Lordships have been much assisted by counsel on each side. The appellant before the board submitted that: (1) section 72 did not apply until the machinery under section 71 had been put into operation and that the assessments were therefore ultra vires; (2) alternatively, that if sections 71 and 72 were alternatives the respondent had elected to give notice under section 59 and could not then operate section 72 during the currency of the "time allowed"; (3) that the Court of Appeal had not judicially considered the question of wilful default or neglect under sections 40 and 72 or alternatively that in any event the whole sum assessed as penalties should be remitted to the Supreme Court.

If he succeeds on his first submission points (2) and (3) do not arise. The arguments on the first point may be summarized as follows. The appellant submitted that section 71 (1) lays down the procedure which has to be followed in all cases. The words "time allowed," and this is not disputed, refer to the time allowed for the furnishing of the return under section 59 (1). If, therefore, the commissioner believes someone to be assessable or possibly assessable he must serve a notice. If a return is made and is accepted the commissioner proceeds under section 71 (2) (*a*). If he does not accept the return then he proceeds under section 71 (2) (*b*). If no return is delivered then section 71 (3) applies. In no case can he assess until the "time allowed" has expired.

There may be cases in which the return and particulars show that no tax is chargeable and no assessment is therefore made. The return is accepted or not disputed but does not lead to an assessment.

Coming then to section 72, it is submitted for the appellant that the cases in which the person has not been assessed will be those referred to in the last paragraph, but in which at some later date additional information makes it appear to the commissioner that an assessment ought to have been made. In other words, section 72 is dealing only with cases where subsequent information leads either to an assessment for the first time or to an additional assessment. It has no application to cases in which the machinery of section 59 (1) has not been operated.

The respondent relies on the general words of section 72. They cover, he submits, any case in which a person has not been assessed whether he has had a notice and a "time allowed" under sections 59 and 71 or not. He conceded that it would be contrary to the scheme of the Act to operate section 72 in current cases. Sections 59 and 71 were clearly intended to be the normal machinery. But if a year or longer had elapsed following the year of income section 72 was properly available. It seemed impossible to formulate any precise limit of time before which the use of section 72 would be ultra vires. The Court of Appeal accepted the argument that the two sections overlap over the

whole period [1]: "If the department were to abandon altogether "the practice of requiring returns to be made, and began to assess "in every case by guesswork under section 72, the courts might "not be slow to say that the powers given by the Act were being "abused. But where powers given to a department of Govern- "ment, or other statutory authority, are capable of being, through "perversity, misused, it does not follow that they are likely "to be misused, and much less does it follow that they should "be construed in an unnaturally restricted sense merely because "of the theoretical danger of misuse."

Their Lordships have come to the conclusion that the construction submitted by the appellant is right for the following reasons. If the power to make an assessment under section 72 applies to the making of an original assessment their Lordships are unable to imply a term restricting it to back cases or making it ultra vires to operate it at any time. One would expect an opportunity to make a return to be a condition precedent to assessment. This is supported by the provisions for personal allowances in Part VI of the Act. If the respondent is right any person can be assessed without having any such opportunity. There would be two concurrent jurisdictions, one providing reasonable protection for the taxpayer and the other providing no protection quoad the original assessment, apart from a right to appeal. Such a construction seems to their Lordships inconsistent with the general and mandatory provisions of section 71. That section is providing how all original assessments are to be made.

Section 72 deals, inter alia, with additional assessments, with cases in which, owing presumably to subsequent information, the Revenue desires to reopen what had apart from section 72 been settled. Having regard to the wording of section 71 it seems to their Lordships necessary to restrict the words as to assessing for the first time in section 72 to cases in which, the machinery of section 59 (1) having been operated, no assessment has been made. So far as the taxpayer is concerned, after he had made his return or had an opportunity of doing so, it was settled that he was under no liability to tax for that year. Subsequent information leads the Revenue to reopen the matter and decide that he ought to be assessed.

Section 72 is dealing with the reopening of cases which had been settled under the normal procedure. This explains the fact that section 72 contains a prima facie limitation of seven years whereas section 71 contains no limitation. On the respondent's argument this seems inexplicable. On the other argument it seems reasonable that there should after a certain time be no reopening of what has been settled unless there has been fraud or wilful default.

The construction also gains support from the words "ought "to have been charged," when they occur for the second time

[1] (1956) 23 E.A.C.A. 303, 310.

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in section 72. They there apply to "such amount" as well as "such additional amount."

Before making the assessments, therefore, the "time allowed" under section 71 had to elapse." It is common ground that it did not and their Lordships will humbly advise Her Majesty that the appeal be allowed and the assessments set aside. The respondent must pay the appellant's costs throughout.

Solicitors: *A. L. Bryden & Williams*; *Charles Russell & Co.*

C. C.

[PRIVY COUNCIL.]

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MOHAMED HAJI ABDULLA AND ANOTHER . APPELLANTS;
AND
GHELA MANEK SHAH AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Vendor and Purchaser—Contract—Sale of rent-restricted property—Surrender of tenancy between contract and completion—Duty of vendor not to relet without consulting purchaser—Indian Transfer of Property Act (IV of 1882), *s.* 55 (1) (*e*)—*English principles applicable.*
Eastern Africa (Kenya)—Vendor and purchaser.

A vendor of rent-restricted property which has become vacant between the dates of the contract and of completion is under a duty to consult the purchaser before reletting before completion of the contract.

After the appellants had entered into an agreement to sell to the respondents property in Nairobi consisting of three shops let to three tenants at rents controlled under the local rent restriction legislation, one of the tenants surrendered his tenancy before completion of the contract. The appellants, without consulting the respondents, relet the vacated shop on the same day to another tenant at the same maximum controlled rent. The evidence established that the value of the premises with the vacated shop unlet was Shs. 18,000/– more than with the shop let. The appellants being unwilling to compensate the respondents in respect of the depreciation in value of the premises resulting from the reletting, the respondents claimed specific performance of the agreement and compensation by way of an abatement of the purchase price for the loss resulting from the reletting:—

Held, that the vendors' obligations were defined in section 55 (1) (*e*) of the Indian Transfer of Property Act, 1882, as applied to Kenya, which provided that the seller was bound "between the date "of the contract of sale and the delivery of the property to take as "much care of the property . . . as an owner of ordinary prudence "would take of such property. . . ." The words "take . . . care "of the property" were not restricted to the preservation of the

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* *Present*: LORD REID, LORD COHEN, LORD SOMERVELL OF HARROW.

property from physical deterioration, but included care in its management having regard to the interests of the purchaser. On that view the obligations imposed by section 55 (1) (*e*) were substantially those imposed on the vendor under English law, and the vendors here had no right, without consultation with the purchasers, to diminish the value of the property as it was after the surrender by reletting. The respondents were therefore entitled to a decree for specific performance and an abatement of Shs. 18,000/– from the purchase price.

Dictum of Sir George Jessel M.R. in *Egmont (Earl of)* v. *Smith* (1877) 6 Ch.D. 469 at 476 applied.

Order of the Court of Appeal for Eastern Africa (1956) 23 E.A.C.A. 342 affirmed.

APPEAL (No. 10 of 1957) from an order of the Court of Appeal for Eastern Africa (October 13, 1956) dismissing an appeal by the present appellants and allowing a cross-appeal by the respondents from a judgment of the Supreme Court of Kenya (February 18, 1954).

The following facts are taken from the judgment of the Judicial Committee: The plaintiffs, the present respondents, claimed specific performance of an agreement in writing dated December 6, 1951. The agreement was for the sale by the defendants, the present appellants, to the plaintiffs of certain land and buildings at River Road, Nairobi. The plaintiffs' claim for specific performance was made subject to an abatement of the purchase price by reason of an alleged breach of duty or contract by the defendants.

The only question in the appeal was whether the respondents. hereinafter called the purchasers, were entitled on completion to compensation by way of an abatement of the sum to be paid to the appellants, hereinafter called the vendors, to complete the purchase.

The material provisions of the agreement were as follows:

"MEMORANDUM OF AGREEMENT OF SALE OF THE
"UNDER-MENTIONED PROPERTY BETWEEN THE
"PARTIES HEREUNDER MENTIONED UPON TERMS
"SPECIFIED BELOW

"1. Name of the vendors:—MOHAMED HAJI ABDULLA and
"(2) AHMED HAJI ABDULLA.

"2. Name of the purchaser:—KHETSHI GHELABHAI [as agent] for the respondents].

"3. Description of property:—Plot known as L.R. No. 209/
"502 situate at River Road, Nairobi, together with the building
"standing thereon which is rented by (1) Hiragar Motigar (2)
"Velji Ravji, Barber (3) Deva Naran, Shoemaker, Free from
"encumbrances.

"4. Purchase price:—Shs. 125,000/– (Shillings One hundred
"and twenty five thousand only).

"5. Deposit against purchase price made on the signing here-
"of:—Shs. 25,000/– (Shillings Twenty five thousand only).

"6. Balance of purchase price:—Shs. 100,000/– (Shillings

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"One hundred thousand only) to be paid on or before March 31, "1952, against execution of a proper conveyance by the vendors "in favour of the purchaser, his nominee or nominees.

"7. Conveyance:—To be prepared by an advocate named by "the purchaser, their nominee or nominees. Cost of such advo-"cate, stamping and registering the conveyance to be borne by "the purchaser.

"10. Rent and rates:—The purchaser is entitled to one-fifth of "the net rent from the date hereof to the date of execution of a "proper conveyance. The vendors are liable to pay municipal "rates and ground rent only up to the date of execution of proper "conveyance.

"Dated at Mombasa this 6th day of December, 1951."

On February 16, 1952, prior to the execution of any conveyance one of the tenants, Velji Ravji, surrendered his tenancy of the part of the building let to him. On the same day, without consultation with the purchasers, the vendors relet the vacated part of the building to a new tenant at the same rent. Under the rent restriction legislation in force at the time the rent under the new lease was the maximum rent. Owing to the shortage of accommodation the premises with Velji Ravji's part vacant were worth Shs. 18,000/- more than with that part let. The purchasers claimed that this sum should be deducted from the purchase price or awarded as damages.

Before the trial judge (Bourke J.) the purchasers succeeded. Owing to a misunderstanding as to an agreement between counsel judgment was entered for Shs. 18,000/- as damages and not for specific performance with an abatement of the purchase price. This led to a notice of motion for a review of the judgment. This was dismissed and the purchasers by a cross-appeal asked for a variation of the judge's order by substitution of an order for specific performance on payment of the agreement price less the deposit, less the Shs. 18,000/- and less taxed costs.

The vendors' appeal was dismissed and the cross-appeal in substance allowed by the Court of Appeal (Sinclair Ag.-P., Briggs and Bacon JJ.A.).

1958. Oct. 21, 22. *H. E. Francis* for the appellants.
Raymond Walton and *Gerald Harris* for the respondents.

The following cases, in addition to that cited in the judgment, were referred to in argument: *Lake* v. *Dean* [1]; *Cook* v. *Taylor* [2]; *Wilson* v. *Clapham*.[3]

December 1. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: The purchasers submit that the vendors

[1] (1860) 28 Beav. 607.
[2] [1942] Ch. 349; 58 T.L.R. 278; [1942] 2 All E.R. 85.
[3] (1819) 37 E.R. 289.

committed a breach of duty owed to the purchasers by reletting without consulting them. The purchasers admit that the vendors were interested in four-fifths of the rent until completion, and that the purchasers would be bound to indemnify them for this loss arising from the premises being kept vacant. It was accepted in the courts below that if the purchasers had been consulted they would have wished the premises to remain vacant, and would have been willing to pay the loss of rent or allow it to be deducted from their one-fifth share. It would not have amounted to more than £10 or £15.

The case depends on the duty owed by a vendor to a purchaser after contract but before completion.

By article 11 (*b*) of the East Africa Order in Council, 1897, the provisions of the Indian Transfer of Property Act, 1882, as amended, prior to November 27, 1907, were made part of the law of Kenya. It is provided by section 54 that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. This negatives the English principle under which a contract for sale confers an equitable title on the purchaser. That principle being negatived the vendor's obligations, if any, must be sought elsewhere. They are dealt with in section 55 of the Act. The first argument arises on section 55 (1) (*e*).

"55. In the absence of a contract to the contrary, the buyer "and the seller of immovable property respectively are subject "to the liabilities, and have the rights, mentioned in the rules "next following, or such of them as are applicable to the property "sold:—

"(1) The seller is bound . . . (*e*) between the date of the "contract of sale and the delivery of the property to take as much "care of the property and all documents of title relating thereto "which are in his possession as an owner of ordinary prudence "would take of such property and documents."

The vendors submit that the words "take . . . care of" should be limited to protecting the property from physical deterioration; that they remained owners and were entitled to relet; that the subject-matter of the contract was a property fully let and that the vendors have always been ready and willing to convey the property fully let; that if the purchasers had desired some right of control or consultation if the whole or part of the premises became vacant then they should have so stipulated in the contract; that therefore no duty of consultation in the circumstances arose under section 55 (1) (*e*), nor can any such duty be implied.

The purchasers submitted in the first place that the words "take . . . care of the property" should be given a wide meaning.

Their Lordships reject the submission that the words "care "of the property" are restricted to the preservation of the property from physical deterioration. They include care in its management having regard to the interests of the purchaser. On

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this view the obligations imposed by section 55 (1) (*e*) are substantially those imposed on a vendor under English law.

The Court of Appeal cited with approval the opinion of Mulla and Gour in their textbooks on the Indian Act that the vendor's duties to a purchaser under paragraph (*e*), although he is not a trustee, are the same as they would be if section 15 of the Indian Trusts Act, 1882, were applicable. That section reads as follows: "15. A trustee is bound to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own; and in the absence of a contract to the contrary a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust property." This is substantially the position of a trustee in relation to property under English law. Their Lordships therefore agree with the courts below that English principles and authorities are relevant and of assistance.

On this basis it seems plain that the vendors had no right without consultation with the purchasers to diminish the value of the property as it was after the surrender by reletting.

Reliance was placed by the Court of Appeal on a passage in *Egmont* v. *Smith*.[1] In that case Sir George Jessel M.R. considered the position if after contract and before completion a tenancy came to an end. The land was agricultural land. The Master of the Rolls said this [2]: "I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain sufficient rent, and to keep the farms in a good state of cultivation. That, I have no doubt, is the general law. Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.

"I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done; because if the purchaser says I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off, it might be a proper thing to allow them to remain unlet."

In the circumstances that prevailed in Nairobi the reletting had the same effect in relation to value as the leaving vacant of agricultural land. Their Lordships are therefore of opinion that the decision of the Court of Appeal was right.

The vendors sought to rely on other provisions in section 55 In their Lordships' opinion these do not assist or affect the conclusion to which they have come as to the construction and application of section 55 (1) (*e*).

The purchasers sought alternatively to support the decision

[1] (1877) 6 Ch.D. 469. [2] Ibid. 476.

of the Court of Appeal on the terms of the contract, and on a general proposition that a purchaser ought always to be consulted with regard to a new letting. It is unnecessary to consider circumstances other than the present, which are in their Lordships' opinion covered by section 55 (1) (*e*).

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the order of the Court of Appeal confirmed. The appellants must pay the costs of the appeal.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Linklaters & Paines.*

C. C.

[CHANCERY DIVISION.]

LONDON COUNTY COUNCIL *v.* MONKS.

1958
Nov. 26.
Danckwerts J.

[1958 L. 913.]

Practice—Payment into court—Payment out—Enforcement of judgment—Judgment recovered by creditor in county court—Fund lodged in High Court to credit of judgment debtor—Application to High Court for charging order on fund in respect of judgment in county court—Jurisdiction—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 12 *—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 136 (1) (2)—*Administration of Justice Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 34 (3).

The defendant was awarded £2,000 compensation, in relation to a compulsory purchase, which was lodged in the High Court to her credit. Later the London County Council took proceedings in the county court to recover the cost of her maintenance, and recovered judgment for £292 14s. 9d. and £10 2s. costs.

On a summons by the London County Council asking that the sum of £2,046 5s. 2d., being the compensation money with accrued interest, stand charged with payment to the London County Council of the £302 16s. 9d.:—

Held, (1) that it was not the practice of the court to make an order on the Paymaster-General in respect of a fund in the High Court in order to enforce a judgment of an inferior court; and (2) that, as the power to remove county court proceedings by certiorari into the High Court under section 136 of the County Courts Act, 1934,[1] had been terminated by the repeal of that section

[1] Judgments Act, 1838, s. 12: "Be it enacted that by virtue of any writ of fieri facias to be sued out of any superior or inferior court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank-notes (whether of the . . . Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writ of fieri facias shall be sued out. . . ."

County Courts Act, 1934, s. 136: "(1) A judge of the High Court, if satisfied that a person, against whom judgment for an amount exceeding £20 has been obtained (whether by way of satisfaction of a claim or counterclaim or by way of costs or otherwise) in a county

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by section 34 of the Administration of Justice Act, 1956, there was now no power to satisfy a county court judgment out of a fund lodged in the High Court by directing a payment out or by making a charging order.

Brereton v. *Edwards* (1888) 21 Q.B.D. 488 and *In re Prior* [1921] 3 K.B. 333 considered.

ADJOURNED SUMMONS.

The following statement of facts is taken in substance from the judgment of Danckwerts J.

In 1947 the London County Council made a compulsory purchase order in relation to a dwelling-house of which the owner and occupier was the defendant, one Miss Monks, which was followed up by a notice to treat served on her on September 14, 1949. On December 22, 1954, the Lands Tribunal awarded her compensation in the sum of £2,000 and, on September 19, 1955, the London County Council having duly acted in accordance with the procedure laid down by the Lands Clauses (Consolidation) Act, 1845, the £2,000 was lodged in court. On October 10, 1955, notice of entry was given.

Miss Monks refused to move out, and the sheriff had to take possession, which he did on February 15, 1956. Thereupon Miss Monks was removed to a hostel and maintained there by the London County Council until May 24, 1957, when she left and went to Blackpool.

Sections 21 and 22 of the National Assistance Act, 1948, required the London County Council to recover the costs of maintenance which, in the case of Miss Monks, amounted to £292 14s. 9d. To recover that the council took proceedings in the Lambeth County Court and, on February 21, 1958, recovered a judgment for £292 14s. 9d. and £10 2s. for costs, a total of £302 16s. 9d.

By this summons, taken out on May 12, 1958, the London County Council asked for an order that the sum of £2,046 5s. 2d. (being the sum paid into court together with accrued interest) stand charged with payment to the London County Council of

"court, has no goods or chattels "which can be conveniently seized to "satisfy the judgment, may, if he "thinks fit, and on such terms as to "costs as he may direct, order a writ "of certiorari to issue to remove the "judgment into the High Court. "(2) When a judgment is so "removed, it shall have the same "force and effect and the same pro-"ceedings may be had thereon as if "it were a judgment of the High "Court. . . ."

Administration of Justice Act, 1956, s. 34: "(3) Section 136 of the "County Courts Act, 1934 (which "relates to the removal to the High "Court of a county court judgment "where the judgment debtor has no "goods or chattels which can be "conveniently seized to satisfy the "judgment) shall cease to have "effect."

S. 35 (1): "The High Court and "any county court may, for the pur-"pose of enforcing a judgment or "order of those courts respectively "for the payment of money to a "person, by order impose on any such "land or interest in land of the "debtor as may be specified in the "order a charge for securing the pay-"ment of any moneys due or to be-"come due under the judgment or "order."

£302 16s. 9d., being the amount of the county court judgment together with £10 2s. costs.

S. L. Newcombe for the London County Council as applicants. The respondent was not represented and did not appear.

The following case, not cited in the judgment, was referred to in argument: *Hudson* v. *Bryant*.[2]

Danckwerts J., saying that this application raised a point of very considerable difficulty and of some importance, stated the facts and continued: This is an application for payment out of the sum of £2,000 and interest which has since accrued, the amount of the debt to the London County Council.

The practice before the Administration of Justice Act, 1956, was that the proceedings in the county court were removed to the High Court of Justice by writ or order of certiorari and the reason for that was that, under section 151 of the County Courts Act, 1888 (subsequently re-enacted by section 136 of the County Courts Act, 1934), there was power in that way to make the judgment of the county court equivalent to a judgment of the High Court.

Section 136 provided: "(1) A judge of the High Court, if "satisfied that a person, against whom judgment for an amount "exceeding £20 has been obtained (whether by way of satis-"faction of a claim or counterclaim or by way of costs or other-"wise) in a county court, has no goods or chattels which can be "conveniently seized to satisfy the judgment, may, if he thinks "fit, and on such terms as to costs as he may direct, order a "writ of certiorari to issue to remove the judgment into the "High Court."

Subsection 2 provided: "When a judgment is so removed, "it shall have the same force and effect and the same proceed-"ings may be had thereon as if it were a judgment of the High "Court . . ."

Under that section it was open to the judgment creditor to proceed in the High Court to enforce the county court judgment in the same way as he would have in the High Court of Justice with regard to a High Court judgment; and, of course, the Judgments Act, 1838, would apply in the manner available under that Act.

I should refer to section 14 of the Judgments Act, 1838, which enables government stock and funds and stock and shares in public companies belonging to the debtor to be charged by order of the judge in favour of a judgment creditor. That section refers only to any judgment which has "been entered up in any "of Her Majesty's superior courts at Westminster." There is also section 12 which enables proceedings under fieri facias to be taken. It provides: "Be it enacted that by virtue of any writ

[2] (1845) 1 Coll. 681, 685.

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"of fieri facias to be sued out of any superior or inferior court "after the time appointed for the commencement of this Act, "or any precept in pursuance thereof, the sheriff or other officer "having the execution thereof may and shall seize and take any "money or banknotes (whether of the . . . Bank of England, or "of any other bank or bankers), and any cheques, bills of "exchange, promissory notes, bonds, specialties, or other "securities for money belonging to the person against whose "effects such writ of fieri facias shall be sued out . . ."

I need not read the rest of that section, but it is necessary to point out that in that section "inferior court" is referred to as well as "superior court." On the other hand, it would appear that the right to seize money or banknotes means cash in the form of coins or notes, and would not, for instance, apply to a bank account, which, of course, is really a chose in action, being a debt owed by the bank on the current account to its customer, and which can be reached by the appropriate manner of garnishee proceedings.

Money in the hands of the Paymaster-General at the bank would seem to me to be in the same position as any other bank account; but there is a line of authorities to which I have been referred which show that in the case of a fund in court, as it is commonly called, at any rate in the case of a High Court judgment, the court would direct payment out or make a charging order in favour of a High Court judgment creditor. Those cases are *Brereton* v. *Edwards*,[1] and *In re Prior*,[2] the latter case being the case of a fund which, I think, had been paid to the official receiver in bankruptcy.

The real basis of those cases seems to me to be that, where the court has the fund under its own control, as in the case of a fund standing to the credit of some account of the Paymaster-General, the Paymaster-General being the officer of the High Court and all the judges of any Division of the High Court being judges of that court, the judges will enforce a High Court judgment by directing their officer to pay out the money or by making a charging order on the fund in question, so that the judgment creditor shall not be defeated with regard to satisfaction of the judgment.

That was in accordance with the practice of the old Court of Chancery, it appears, before the Judicature Acts came into force: but the question is, does that practice also exist with regard to a judgment creditor who is claiming, not under a High Court judgment but under a judgment of some inferior court, a county court for instance? I am not satisfied that it does, and it seems to me that the provisions of the County Courts Act indicated the contrary because they provided for a county court judgment being made equivalent to a High Court judgment by transfer to the High Court of Justice. The point is that by section 34 of the

[1] (1888) 21 Q.B.D. 488. [2] [1921] 3 K.B. 333.

Administration of Justice Act, 1956, section 136 of the County Courts Act, 1934, has been repealed.

Section 34 provides: "(3) Section 136 of the County Courts "Act, 1934 (which relates to the removal to the High Court of a "county court judgment where the judgment debtor has no goods "or chattels which can be conveniently seized to satisfy the "judgment) shall cease to have effect." It would appear that the reason for the passing of that provision was that the section was dealing with the abolition of the writ of elegit, and that the Act of 1956 was providing by section 35 (1) powers by which "The High Court and any county court may, for the purpose of "enforcing a judgment or order of those courts respectively for "the payment of money to a person, by order impose on any such "land or interest in land of the debtor as may be specified in the "order a charge for securing the payment of any moneys due or "to become due under the judgment or order."

There was, therefore, being provided a different method of securing payment out of land or out of proceeds of land on a judgment which had been obtained in the appropriate court. It may be that the draftsman of the Act had overlooked the fact that, in providing for the repeal of section 136 of the County Courts Act, 1934, he might be affecting also the provisions applicable to a fund in the High Court in the hands of the Paymaster-General.

Whether that is so or not is, of course, pure speculation. I have to deal with the situation as I find it, and it seems to me that as section 136 has been repealed there is no method of removing the county court proceedings to the High Court so as to be equivalent to a High Court judgment, and that being so, there is no method by which the funds in the hands of the Paymaster-General can be reached.

It seems to me an unfortunate result because, of course, the judgment ought to be satisfied if the debtor has a fund, but I am forced to the conclusion that the court does not in practice make an order on the Paymaster-General in the case of a judgment of an inferior court, and no authority has been produced to me which would justify my making an order for payment out of funds in court in the present case.

Summons dismissed.

Solicitor: *J. G. Barr, Solicitor, London County Council.*

K. R. A. H.

[PROBATE, ETC., DIVISION.]

1958
Oct. 20;
Nov. 24.

Collingwood J.

O'MAHONEY *v.* O'MAHONEY.

Husband and Wife—Maintenance—High Court—Committal order—Whether order pending suit and subsequent maintenance order one "judgment"—Matrimonial Causes (Judgment Summons) Rules, 1952 (*S.I.* 1952, *No.* 2209) (*L.* 21)), *r.* 6 (3).

In November, 1957, a committal order was made suspended upon the payment, in addition to sums due under an order for alimony pending suit for a wife and maintenance pending suit of two children, of further weekly sums in discharge of arrears. In March, 1958, a decree in favour of the wife having been made absolute in January, 1958, an order for maintenance was made in favour of the wife and children as from decree absolute. In September, 1958, an application was made for leave to issue the suspended committal order. At that date the husband was substantially in arrear with payments under the maintenance order. He had, in fact, paid an amount which was more than sufficient to cover the sums due in discharge of the arrears under the suspended committal order for which, at all material times, he remained liable but not if, as was the contention of counsel for the wife, the sums paid were primarily allocated to the discharge of the current order for maintenance.

The registrar refused the application and referred the matter to the judge:—

Held, (1) that, in determining to what extent the sums paid by the husband after March, 1958, were allocated towards the discharge of his liability for arrears under the suspended committal order or the discharge of his liability under the current order, the material consideration was not his intention based on his conception or misconception of his liability but the real nature of his liability in law.

(2) That the order for maintenance of March, 1958, could not be a "judgment" for the purposes of a suspended committal order at the date of the making of which it was not in existence; sums paid by the husband after March, 1958, were not, therefore, to be deemed to be primarily in discharge of the sums due under that order and, the terms of the suspended committal having been complied with, the application must be refused.

APPLICATION for leave to issue an order for committal.

On August 29, 1956, the husband filed a petition for dissolution of marriage on the grounds of cruelty and adultery, and on February 21, 1957, he was granted leave to file a supplementary petition alleging the same grounds. On March 4, 1957, the respondent wife filed an answer denying both charges and charging the husband with cruelty and adultery. There was a cross-prayer for relief and for custody of the two children of the marriage.

On April 2, 1957, Mr. Registrar Compton Miller made an order for alimony pending suit at the rate of £1 a week as from March 16, 1957, and for maintenance of the children pending suit of £1 a week for the girl and 10s. a week for the boy as from the same date.

The husband did not proceed with the charge in his petition

and supplemental petition, and on August 9, 1957, the registrar ordered that proceedings arising from the prayer of the petition be stayed, and that the cause should proceed upon the prayer in the wife's answer. On November 29, 1957, the wife was granted a decree nisi upon both grounds alleged in the answer.

Meanwhile, on November 11, 1957, on the hearing of a judgment summons in respect of default in payments amounting to £70, Barnard J. made a committal order, suspended so long as the husband paid, in addition to any sums accruing under the order of April 2, 1957, the sum of 2s. 6d. a week.

On January 14, 1958, the decree was made absolute and on March 19, 1958, an order was made by Mr. Registrar Compton Miller, dating as from the date of the decree absolute, for payment of maintenance to the wife during joint lives or until further order at the rate of £1 weekly, and for maintenance of the elder child £1 10s. a week, and for the younger child £1 a week.

In September, 1958, by which date substantial arrears had accumulated under the order of March 19, 1958, an application was made to Mr. Registrar Wilkinson for leave to issue the suspended committal order of November 11, 1957. From January 14, 1958, until March 19, 1958, payments amounting to £15 10s. were made, and until the application to the registrar total payments amounted to some £40, more than sufficient to cover the liability to discharge arrears imposed on the husband by the suspended committal order. The payments were at all times irregular in amount.

The registrar, holding that rule 6 (3) of the Matrimonial Causes (Judgment Summons) Rules, 1952,[1] did not apply to the circumstances of the present summons, refused the application and made a report setting out the reasons therefor which, after referring to the cessor of liability under the order of April 2, 1957, on January 14, 1958, and the fact that the payments made thereafter were more than sufficient to cover the payments off arrears at 2s. 6d. a week for which the husband remained liable, read as follows:

" . . . he " (the husband) " has been liable, under a maintenance order dated March 19, 1958, and operative as from January 14, 1958, for maintenance at £3 10s. a week; but this is a subsequent order that is not connected with the judgment summons and commitment order. The payments since the decree absolute have been irregular in date and amount, and I am not prepared to say that they are not partly (or even wholly) allocated to the judgment debt. The fact that he is seriously in

[1] Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6 (3): "If an order for commitment is suspended . . . on terms . . . all payments thereafter made under the order shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the judgment and secondly, in or towards the discharge of the debt in respect of which the judgment summons was issued . . ."

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"arrears in respect of the new maintenance order does not mean "that all payments must be allocated to those arrears. . . ."

The registrar then referred the matter to a judge. On the hearing of the reference letters, which were not before the registrar, written by the husband on the making of certain of the payments were before the court. The husband appeared in person, the matter having been previously adjourned in order that he might be present.

A. B. Ewbank for the judgment creditor. It is conceded that, if the registrar was right in law in holding that the payments in fact made by the judgment debtor were not to be allocated wholly towards the discharge of payments under the current order, then he has paid sufficient to comply with the terms of the committal order.

It is, however, submitted that the registrar was not right in so holding and that, in circumstances, such as the present, the question to the discharge of which debt the payments made were allocated is governed by the intention of the debtor at the time of making the payments. From the nature of the amounts paid and from the letters which accompanied some of the payments it is to be inferred that this debtor did not intend more than a small proportion of the payments to be credited to the arrears.

Alternatively, where there is an order for payment of alimony or maintenance for children before decree absolute, followed by an order for permanent maintenance, it is submitted that both orders amount to one judgment for the purpose of rule 6 (3) of the Matrimonial Causes (Judgment Summons) Rules, 1952. [Rule 1 (3) of the Rules of 1952 was referred to as to the interpretation of "judgment."] It is true that alimony is invariably referred to as alimony pending suit but in section 32 of the Matrimonial Causes Act, 1857, the words used are "interim order for the pay-"ment of money or otherwise," and since that date similar words have been used in all the statutes, and this is so in section 19 (1) of the Act of 1950. "Interim" clearly envisages something which is temporary and which may be succeeded by an order which is permanent. To regard an order for alimony pending suit and an order for maintenance as separate orders is inconsistent with the Acts. It is submitted that the true position with regard to orders made in favour of a wife both pending suit and after decree absolute is analogous to orders made in respect of children. [Section 26 (1) of the Act of 1950 was referred to.] Where an order is made in favour of a child or children before decree there is no question of that order being pending suit or necessarily interim, and if such an order is made after decree absolute it is submitted that both orders would constitute one judgment.

[COLLINGWOOD J. Do you say that if your second point is valid it applies irrespective of intention?]

That is so.

Cur. adv. vult.

November 24, 1958. COLLINGWOOD J., reading his judgment, referred to the facts and continued: In the first place it is to be noted that the order made on April 2, 1957, by Mr. Registrar Compton Miller (on which the committal order was made by Barnard J. on November 11, 1957) was limited in regard to the children in exactly the same way as in regard to the wife, that is to say, it was an order to pay "pending suit." It was not, therefore, an order which continued until replaced by another order, although counsel described it as an interim order; it automatically ceased to have effect on January 14, 1958, when the decree was made absolute. It follows, in my opinion, that as from January 14, 1958, until March 19, 1958, when the maintenance order was made, the husband's only liability was to continue the payment of 2s. 6d. weekly towards the arrears.

The fact that, subsquent to the decree absolute, a maintenance order has been made on March 19, 1958, directing the husband to pay £3 10s. a week, as from the date of the decree absolute, has, in my opinion, no effect whatever on the order made on the judgment summons in November, 1957. Between January 14, 1958, when his liability under the first order ceased (save as to 2s. 6d. weekly off arrears) and March 19, 1958, when an entirely fresh liability was imposed upon the husband, he made payments totalling £15 10s., which represents 124 payments of 2s. 6d.

It was contended, on behalf of the judgment creditor, that it was necessary only to look at the debtor's intention as regards these payments, an intention to be derived from the letters accompanying them and the amounts of the payments made. But I think it is necessary to have regard, not to his conception or misconception as to his liability during that period, but to what his liability in law really was. It was further urged that, irrespective of the debtor's intention, both the orders, that for alimony and maintenance of children pendente lite, and that for permanent maintenance, are really one judgment under the Matrimonial Causes (Judgment Summons) Rules, 1952. This submission I have already dealt with. It is important to remember that the whole basis of committal under section 5 of the Debtors Act, 1869, and the Rules of 1952 is deliberate contempt of court, arising from a failure to pay that which the court, after inquiry as to means, is satisfied that the debtor is able to pay. It seems to me impossible to apply a committal order to a liability due under an order for maintenance which was not in existence at the date of the making of the committal order.

In my opinion the registrar was right in the view which he took, and leave to issue an order for committal must be refused.

Order accordingly.

Solicitors: *Law Society, Divorce Department (J. A. H. Powell).*

E. J.

[COURT OF APPEAL.]

C. A.

1958
Nov. 28.

Lord Denning; Hodson and Ormerod L.JJ.

In re D., AN INFANT.

[Plaint No. 01229.]

Adoption—Applicant—Mother of illegitimate child—Jurisdiction—Considerations for exercise of court's discretion—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 1 (3), 2 (1) (*c*), 12 (2).

The court has jurisdiction under the Adoption Act, 1950,[1] to make an adoption order in favour of the mother of an illegitimate infant, if it is satisfied that in all the circumstances such an order will promote the welfare of the infant.

Where, therefore, a single woman appealed against the refusal of a county court judge to make an adoption order on her application to adopt her own child, which application was supported by the local authority as guardian ad litem on the ground that the mother was "anxious to remove the stigma of illegitimacy from "the child":—

Held, allowing the appeal, that in the exercise of the court's discretion the order should be made, for though an adoption order could not render an illegitimate child legitimate, other advantages, actual and potential, for the child, flowed from such an order.

Per Hodson L.J. The paramount object of the Adoption Act, 1950, is the welfare of the child.

APPEAL from Judge Clothier, Lambeth County Court.

The mother of an infant illegitimate child, applied to the county court for an adoption order to be made in her favour under the Adoption Act, 1950. Her application was supported by the children's officer to the local authority, the London County Council, as guardian ad litem. The confidential report of the local authority (which was in evidence before the court) was in the following terms: "No affiliation order has been made against "the father and no person is liable by virtue of an agreement to "contribute towards the support of the infant. There is no order

[1] Adoption Act, 1950, s. 1 (3): "An adoption order may be made "authorizing the adoption of an in-"fant by the mother or father of the "infant, either alone or jointly with "her or his spouse."

S. 2 (1): "An adoption order "shall not be made in respect of an "infant unless the applicant or, in "the case of a joint application, one "of the applicants— . . . (*c*) is the "mother or father of the infant."

S. 12 (1): "Where an adoption "order is made in respect of an "infant who is illegitimate, then, "subject to the provisions of this "section, any affiliation order or "decree of affiliation and aliment in "force with respect to the infant, "and any agreement whereby the "father of the infant has undertaken "to make payments specifically for "the benefit of the infant, shall "cease to have effect, but without "prejudice to the recovery of any "arrears which are due under the "order, decree or agreement at the "date of the adoption order."

(2): "Where an infant to whom "any such order, decree or agree-"ment as aforesaid relates is "adopted by his mother, and the "mother is a single woman, the "order, decree or agreement shall "not cease to have effect by virtue "of the foregoing subsection upon "the making of the adoption order, "but shall cease to have effect if "she subsequently marries."

"in force or resolution committing her to the care of local "authority. The infant has no right or interest in any property; "she is insured with the Prudential Assurance Company under "an endowment policy for £19 14s. payable after 16 years. The "female applicant is employed as a housekeeper by a Miss [R.] "and receives a weekly wage of £2 10s. in addition to all "residential emoluments. The house is modern . . . very com-"fortably furnished and clean. The infant at present is sleeping "in a cot in her mother's bedroom; an adjacent room is available "for her use later. The female applicant enjoys good health and "there is no known history of hereditary disease. She is anxious "to remove the stigma of illegitimacy from the child. . . . The "care bestowed upon the infant is satisfactory, and as an adoption "order would appear to be in the infant's best interests, it is "recommended that a full order be made."

On the hearing of the application, the county court judge said: "The report by the child welfare officer in support of the applica-"tion states that 'she' (i.e., the mother) 'is anxious to remove "'the stigma of illegitimacy from the child'; and no other reason "for, or advantage to be gained from, the proposed adoption was "advanced either by the applicant herself or by the welfare "officer. Indeed, I gathered from the mother that she herself "considered that she already had all necessary rights and duties "in regard to her child without an adoption order; but I was also "informed that a society which assists unmarried mothers had "obtained some 29 adoption orders in similar cases in different "parts of the country and was disposed to treat a refusal by me "to make an adoption order as somewhat of a test case.

"I refused to make an adoption order in this case for the "following reasons: (1) The Adoption Act, 1950, is not designed "or intended to be used simply for the purpose of 'removing the "'stigma of illegitimacy.' (2) An adoption order if granted in "this case would no doubt soon become common form, and "illegitimacy would automatically be abolished in this country. "(3) It is doubtful whether it would be in the public interest that "the 'stigma' (sic) of illegitimacy should be capable of removal "in every case by the simple expedient of the unmarried mother "adopting her own child. (4) The Legitimacy Act, 1926, which "provides for legitimation where the parents of an illegitimate "child subsequently marry, prescribes somewhat stringent condi-"tions which greatly restrict the cases in which 'the stigma of "'illegitimacy' can be removed even by the subsequent marriage "of a child's parents. I see no reason to suppose that the "Adoption Act is intended or calculated to grant that universal "legitimation (by the simple expedient of a mother's adoption "order) which the Legitimacy Act, 1926, expressly denies in some "cases even to the (subsequent) marriage of the child's parents. "(5) I am aware that section 1 (3) of the Adoption Act, 1950, "may be argued to enact that even without having a 'spouse' "a mother may adopt, by herself, her illegitimate child. But if

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"that subsection does in fact authorize such an adoption, its "application should be limited to special cases. There might, "for example, be a case in which a 'power of appointment' to "'children' might be expected to be created in favour of, and to "become vested in, a woman. In such a case, it might, or might "not, be desirable to allow the woman to adopt her own illegiti-"mate child so that the child might ultimately benefit from the "exercise, or failure to exercise, the power of appointment. "(6) The grant of an adoption order is discretionary (section 1 (1) "of the Adoption Act, 1950). But the claim in this case is that "the unmarried mother has virtually a right to an adoption order "without proving any circumstances other than that the infant "is her child. I do not think the Act intended this." The county court judge accordingly refused the order.

The mother appealed, her appeal being supported by the local authority as the guardian ad litem.

Richard Vick for the mother.
H. E. Francis for the local authority.

LORD DENNING. In this case the mother of an illegitimate child seeks an adoption order. The judge has refused it. She appeals to this court.

The mother is 34. The child, a girl, was born on January 14, 1956, so that the child is nearly three years old. The father was a married man living with his wife. The mother has had no communication with the father since the child was born, and she has not tried to make him responsible for the support of the child.

The mother, when the child was 18 months old, obtained employment as resident housekeeper with a woman who lives in the south of London, and receives a wage of £2 10s. a week and full keep of her daughter and herself. The child and the mother each have a bedroom, and the child's room has been completely decorated and furnished by the employer. There is a good garden. There is another woman who lives in the house with the employer, and there is no doubt that these two women are very much attached to the child and very interested in her welfare and education and want the mother and the child to continue to live with them.

When the mother applied for an adoption order so that the child could be adopted by her, the case was inquired into, as the rules provide, by the welfare officer of the London County Council, who reported, after stating the facts, that the care bestowed on the infant was satisfactory, and that the adoption order would appear to be in the infant's best interests, and he recommended that a full order should be made. But when the case was inquired into by the county court judge, he refused to make the order. He pointed out that the welfare officer in his report had said that the mother was anxious to remove "the stigma of "illegitimacy" from the child. He said: "No other reason for,

"or advantage to be gained from, the proposed adoption was "advanced either by the applicant herself or by the welfare "officer." He refused to make the order because he said the Adoption Act, 1950, was not "designed or intended to be used "for the purpose of removing the stigma of illegitimacy, and that "if an adoption order were granted in this case it would no doubt "become common form and illegitimacy would automatically be "abolished in this country."

I find myself unable to agree with the reasoning of the judge. If one reads the words of section 1 of the Adoption Act, 1950, it is plain to my mind that it contemplates an adoption order being made in the circumstances which are now before the court. Section 1 (3) provides: "An adoption order may be made authorizing "the adoption of an infant by the mother or father of the infant, "either alone or jointly with her or his spouse." Section 2 (1) says: "An adoption order shall not be made in respect of an "infant unless the applicant" is over a certain age or "is the "mother or father of the infant." Those sections seem to me to contemplate this very case. But the matter is carried much further by section 12 (2) of the Act which says: "Where an "infant . . . is adopted by his mother and the mother is a single "woman" and has obtained an affiliation order against the father that order "shall not cease to have effect . . . upon the making "of the adoption order." That shows that if the mother of an illegitimate child gets an affiliation order against the father, and afterwards gets an adoption order herself, the order against the father still operates, so as to make him pay for the child.

The judge has asked what advantage is gained by making an adoption order. In property matters there are several potential advantages. An illegitimate child, according to the old common law, was a child of nobody, so that if the mother, grandmother or grandfather died without making a will, none of their property would ever go to the illegitimate child, because it was no relation in law to them. It was of no kin to anyone. If money was left to children by will it never went to an illegitimate child, since the word "children" was always construed as referring only to legitimate children. That old law has been altered in part, but only in a very small part, by section 9 of the Legitimacy Act, 1926. Now, if the mother of an illegitimate child dies without leaving a will, and has no legitimate children, the illegitimate child can take as next-of-kin of the mother. That is the only alteration. In all other respects the old law remains. If the mother of an illegitimate child marries and has legitimate children, the illegitimate child is still excluded on an intestacy: whereas, if an adoption order is made, the illegitimate child ranks equally with the other legitimate children. Again, if the mother dies before the grandmother, and the grandmother dies intestate, the illegitimate grandchild is excluded from any benefit in the grandmother's estate: whereas, if an adoption order is made, it will be entitled to a share. Again, if the mother, or anyone else,

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leaves a will leaving money to the "children" of this mother, the illegitimate child will take nothing: whereas if an adoption order is made, it will rank as a child in the full sense of the law. So it does make a considerable difference if an adoption order is made.

The judge seemed to think that by making an adoption order the child is rendered legitimate. That is not the case. Illegitimacy and adoption are entirely different matters. The child still remains illegitimate, but, being adopted, it becomes in law for all purposes a child of its mother and suffers none of the disabilities which attach to illegitimacy.

Furthermore, as Ormerod L.J. pointed out, the child, when adopted, is registered in the Adopted Children's Register, and that entry is received in evidence as if it were an entry in the Register of Births; so that if an application has to be made for the child to go to a school, or any other place where the entry is necessary, the entry in the Adopted Children's Register can be used.

Thus it seems to me clear that there are advantages to the child if an adoption order is made. There must, of course, always be an inquiry whether the mother is a suitable person to be given an adoption order and whether the home is suitable. All the circumstances must be taken into account; but it is certainly no bar that the child is illegitimate.

I am glad to find that this court came to the same conclusion in 1957 * in another case where the county court judge had taken the same view as Judge Clothier has taken here. The case was heard in camera so that it was not reported, and there is no record of the judgment, so far as we can find, anywhere. If it had been reported, no doubt, we should not have had occasion to hear this case, because everybody would have known what the position was. We have been told that up till now 87 adoption orders have been made in favour of mothers of illegitimate children. By our

* *Note*: In *In re S, an Infant*, Judge Reid, sitting at Kingston-upon-Thames County Court on November 22, 1956, refused to make an order in similar circumstances. A note of his reasons for his decision was prepared by the county court judge for the assistance of the Court of Appeal on the hearing of the appeal in camera on February 8, 1957, as follows: "The Adoption of "Children Act, 1926 (now replaced "by the Act of 1950) introduced a "new element into English law. "Adoption orders involve serious "legal and social consequences, the "full implications of which may not "even yet have become fully "apparent. It seemed to me there-"fore that an adoption order is not "an order lightly to be made. To "exercise the jurisdiction conferred "by the Act merely as an instrument "for the concealment of feminine "frailty, and as a matter of social "convenience to save the applicant "from possible embarrassing ex-"planations seemed to me not to "be a proper use of the power con-"ferred on the court. Accordingly I "dismissed the application. . . . "Some time after the application "had been disposed of, it occurred "to me that an adoption order might "be said to strengthen the legal "position of the child in that it "would entitle him to take under his "mother's intestacy. This was not "present to my mind at the time of "the application nor did anyone "who appeared before me suggest it "as a relevant consideration."

decision today we affirm that those orders have been rightly made within the jurisdiction of the county court judges concerned.

I think that this appeal should be allowed and an adoption order should be made.

HODSON L.J. I agree. The main question which arises on this appeal came before this court, of which I was a member, on February 6, 1957, where a county court judge had refused to make an adoption order on the application of an unmarried mother on the ground that he did not think the Adoption Act, 1950, should be used to cover up the frailty of women placed in such circumstances. That really is the situation here; but it ought to be made plain that the Adoption Act, 1950, to the sections of which my Lord has referred, contemplates by the very terms of the Act itself in section 1, section 2 and section 12, that an unmarried mother may well be the applicant for an adoption order. The exercise of the discretion of the court is required to ascertain whether the mother or the applicant for the adoption order is able to look after the child and attend to the welfare of the child, the welfare of the child being the paramount object of the Act. In the present case, it is clear that the child will be well cared for in the home in which the mother is, where she is in the employment of a good employer who has done her best for the child and obviously has the welfare of the child at heart. Indeed, the welfare officer of the London County Council, who has reported to the court, supported the application, as he was satisfied as to the prospects of the future welfare of this child. Therefore, there is no doubt that, in the exercise of the court's discretion, this order ought to be made.

It only remains to emphasize that an applicant for an adoption order in such circumstances is not handicapped by the fact that she herself is the unmarried mother of the child she seeks to adopt.

ORMEROD L.J. I agree, and there is nothing I wish to add.

Appeal allowed.
Adoption order made.

Solicitors: *William Sturges & Co.; J. G. Barr, London County Council.*

M. M. H.

[QUEEN'S BENCH DIVISION.]

1958
Dec. 1, 2.

Diplock J.

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

Revenue—Income tax—Penalty—"Treble the tax which . . . ought to be "charged"—Bank interest misstated in income tax return—Additional assessment made—Claim for penalties—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 25 (3).

The defendant, in making a return of income for the year ending April, 1952, stated that interest from his Post Office Savings Bank account amounted to £18 6s., and was assessed for tax accordingly. In fact the interest was £51 5s. 9d., and when that was discovered an additional first assessment was made on the defendant for the amount understated, the tax on which was £14 5s. Subsequently, the Inland Revenue Commissioners, by writ dated June 13, 1956, claimed £438 14s. 6d. for penalties, being triple the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20, under section 25 (3) of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver . . . a true "and correct . . . return which he is required under the preceding "provisions of this chapter to deliver shall—(*a*) if proceeded "against by action in any court, forfeit the sum of £20 and treble "the tax which he ought to be charged under this Act; . . . ":—

Held, that the words "tax which he ought to be charged," in section 25 (3), meant "the amount of the charge which ought to "have been made" (as expressed in section 48 of the Act of 1952), and the point of time for ascertaining that was at the date when proceedings were brought; accordingly, as at the date of the writ the defendant had been charged with all the tax for which he was liable, the only amount recoverable was the penalty of £20.

Attorney-General v. *Till* [1909] 1 K.B. 694; 25 T.L.R. 342; [1910] A.C. 50; 26 T.L.R. 134 considered.

ACTION.

On April 19, 1952, the defendant, Albert Edwin Hinchy, filled up a form prepared for the purpose by the direction of the Inland Revenue Commissioners containing a return of income and claim for allowances for the income tax year 1952/53 in which he stated the interest on accounts and deposits in banks, including post office and other savings banks, was £18 6s. His liability for tax was assessed accordingly at £125 6s. 6d. in respect of his total income. In fact the interest from his Post Office Savings Bank account for that year was £51 5s. 9d. The matter was subsequently discovered by the Inland Revenue and on November 30, 1955, an additional first assessment was made on the defendant for the amount understated, the tax on which was £14 5s.

On June 13, 1956, by a specially endorsed writ, the Inland Revenue Commissioners claimed a penalty in the amount of £438 14s. 6d., under section 25 (3) of the Income Tax Act, 1952,[1]

[1] Income Tax Act, 1952, s. 25: ". . . (3) A person who neglects or "refuses to deliver, within the time "limited in any notice served on him, "or wilfully makes delay in delivering, "a true and correct list, declaration,

being three times the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20. On October 8, 1956, Master Diamond in Chambers ordered that the defendant be at liberty to defend the action.

Alan Orr for the commissioners.
The defendant appeared in person.

In addition to the cases referred to in the judgment, the following cases were cited in argument: *Attorney-General* v. *Johnstone* [2] and *Inland Revenue Commissioners* v. *Elcock*.[3]

DIPLOCK J. This is an action commenced by writ dated June 13, 1956, brought by the Inland Revenue Commissioners against the defendant for penalties under section 25 (3) of the Income Tax Act, 1952. The circumstances are simple, but the consequences of those circumstances, since they depend upon the construction of a particularly difficult Act, are less simple than the circumstances themselves.

On April 19, 1952, the defendant, like many other people, filled up a form prepared for the purpose by the direction of the Inland Revenue Commissioners containing a return of income and claim for allowances for the income tax year 1952. In that return he set out the figure of £18 6s. as the interest on accounts and deposits in banks, including post office and other savings banks. In truth and in fact the amount of his income from that source with the Post Office Savings Bank during the year of return, the year to be taken into account for the purposes of assessment, namely, that ending April 5, 1952, was £51 5s. 9d., so that he had understated the amount of his interest by the difference between those two sums.

The explanation that he has given for doing so does not very much matter, except to say that he must have known that the figure which he gave was wrong if he had given any thought to the matter. His explanation was that he had intended to put the money into savings certificates or other tax-free investments. However, he was wrong, and as a result when this matter was discovered, as discovered it was because of the requirement in section 29 of the Income Tax Act, 1952, that banks, including the Post Office Savings Bank, must make returns, when so required by the inspector of taxes, to the Inland Revenue Commissioners

"statement or return which he is "required under the preceding provi- "sions of this chapter to deliver shall "—(*a*) if proceeded against by action "in any court, forfeit the sum of "£20 and treble the tax which he "ought to be charged under this Act; "or (*b*) if proceeded against before "the General Commissioners, forfeit "a sum not exceeding £20 and treble "the tax which he ought to be "charged under this Act, and where "he is proceeded against before the "General Commissioners, the penalty "shall be recovered in the same "manner as any other penalty under "this Act, and the increased tax shall "be added to the assessment. (4) The "Commissioners shall also proceed to "assess or cause to be assessed every "such person who makes default as "aforesaid. . . ."

[2] (1926) 10 T.C. 758.

[3] (1953) 35 T.C. 27.

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of the amount of interest which they have credited to customers, on November 30, 1955, an additional first assessment was made upon the defendant for the amount understated, the total tax on which was £14 5s. I may add, although I do not think the date is in fact relevant, that on March 9, 1956, an assessment was made on him under Schedule E. Schedule E being dealt with as "pay as you earn," an assessment under Schedule E is not made unless the taxpayer himself requires it.

However, the position at the date of the issue of the writ on June 13, 1956, was that assessments had been made upon the defendant in respect of all the tax to which he was liable for the tax year 1952/53. Those being the relevant facts, the Inland Revenue in this case claimed a penalty in the amount of £438 14s. 6d., that amount being three times the total amount of tax payable by the defendant in respect of the tax year 1952/53, plus £20, not, it is to be noted, three times the tax on the amount which he had understated.

The basis of that claim by the Inland Revenue is section 25 (3) of the Income Tax Act, 1952. That is the subsection which I have to construe. I find it a very difficult subsection, and I gather that I am not the only one to have done so, because in two of what I understand are the standard textbooks on income tax, Simon's Income Tax, 2nd ed., vol. 1, p. 290, para. 417, and Konstam's Income Tax, 12th ed., para. 383, in the current editions, diametrically opposed views are expressed as to the meaning of this subsection so far as quantum of penalties is concerned. Since I am faced with a difficult subsection to construe, it would have been of great assistance to me if I had had the point argued by counsel on each side. The defendant has appeared in person, and consequently I have had to rely on Mr. Orr, who appeared for the Inland Revenue, to give me such assistance as he can on the construction of this difficult Act.

I now turn to the Act. Section 19, with which I must start, provides: "Every individual, when required so to do by a notice "given to him by the surveyor, shall, within the time limited "by the notice, prepare and deliver to the surveyor a true and "correct return in the prescribed form of all the sources of his "income and of the amount derived from each source for the "year preceding the year of assessment, computed in accordance "with the provisions of this Act except that the computation of "income shall be made by reference to the year preceding the "year of assessment and not by reference to any other year or "period: . . ."

Then there is a proviso relating to surtax, liability for which the defendant was fortunately absolved. What is required therefore is a true and correct return of all the sources of income and of the amount derived from each source for the year preceding the year of assessment. In point of fact and as a matter of practice subsection (6) of section 25 applies in the defendant's case, as in most cases. Section 19 deals with a notice given by

the surveyor requiring a person to make the return. Section 25 (6) provides: "If a person delivers to any surveyor a list, declaration or statement on a form prepared for the purpose by direction of the Commissioners of Inland Revenue, he shall be deemed for the purposes of this section to have been required by a notice under the preceding provisions of this chapter"—that is, section 19—"to prepare and deliver that list, declaration or statement, and the time limited for the delivery thereof shall be deemed for the purposes of this section to have expired on the date of its delivery to the said surveyor."

The form which the defendant filled in was the form prepared for the purpose by direction of the Inland Revenue Commissioners. Section 25 (3), on which the point in this case turns, is in the following terms: "A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this chapter to deliver shall—(*a*) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; . . ." I pause there to note that is a fixed penalty. The court, if action is brought in court, can award only that penalty, not less. Then it goes on: "(*b*)," which in contrast deals with a maximum penalty, "if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

Mr. Orr contends that those words "the tax which he ought to be charged under this Act" mean the total amount payable by the person chargeable for the year of assessment, and the claim in this case is made on this basis. If Mr. Orr is right, it means that if a person with an income of a profession or trade or otherwise which renders him liable to tax and surtax of £20,000 in the year, by mistake understates by £1 or less the amount of his income from one source, or if he gives the amount correctly but misdescribes the source, or indeed if he overstates his income by any amount however large or small, he is liable to a penalty of £60,020. I suppose also, Mr. Orr indeed concedes this, having regard to section 30 of the Act, that he is liable to the like penalty if he makes a mistake in the list of his employees which he is required to make under section 27 of the Act.

It is right that in considering that consequence of the construction for which Mr. Orr argues, one should bear in mind the provisions of section 55 of the Act, which excuse a person from penalties if he remedies timeously his default. It provides by subsection (1) that: "A person who has delivered a statement or schedule and discovers any omission or wrong statement

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"therein may deliver an additional statement or schedule rectifying the same, and shall not thereafter be liable to any proceeding by reason of his omission or wrong statement." Subsection (2) provides similarly in respect of non-delivery of a statement; subsection (3) provides that if proceedings have already been started before the General Commissioners, and it is proved to their satisfaction that no fraud or evasion is intended, they may, but not must, stay the proceedings, and, where proceedings have been commenced in a court in the case of a certificate to the like effect from the commissioners, the court may also stay the proceedings.

Apart from that relief, which may be available in appropriate cases, the consequences which I have indicated follow—follow I think inescapably—from the construction for which Mr. Orr has contended. If that is what Parliament meant by the subsection I must of course apply it, but the consequences seem to me to be absurd and unjust, and if there is some other possible construction consistent with the words which leads to results less absurd and unjust, I should be inclined, and I think rightly inclined, to adopt it.

I think there is an alternative construction. As Lord Dunedin pointed out in *Whitney* v. *Commissioners of Inland Revenue*,[1] there are three stages in the imposition and collection of tax: stage 1, a general declaration of the liability of the subject, which is made by section 1 of the Income Tax Act, 1952, and the appropriate section in the Annual Finance Act; stage 2, quantification of that liability by means of assessment by the commissioners in accordance with the provisions of the Act, and stage 3, the recovery of the tax. While the phraseology of the Income Tax Act, 1952, is by no means uniform, Part II appears to use the expression "chargeable" in relation to persons, property and profits and during the first stage, that is to say before the liability has been quantified by assessment. It appears to treat tax as having been "charged" on the person assessed when, and only when, the assessment has been made.

Section 25 (3) imposes a liability of treble the tax which he, that is the person proceeded against, "ought to be charged under "this Act," an expression which, having regard to the terms of section 148, means, in relation to Schedule D, the tax which ought to be charged upon him. It is to be noted that the expression is "ought to be charged," not "ought to have been charged." It seems to me that a reasonable meaning of the expression is the tax to which he ought to be charged, that is to say duly assessed, but to which he has not been charged or duly assessed by reason of the default. That is to say the increased tax which, when one looks at the latter part of the subsection, is to be added to the assessment. Subsection (4) appears to me to support this construction. It

[1] [1926] A.C. 37, 52; 42 T.L.R. 58.

reads as follows: "The commissioners shall also"—a significant word—"proceed to assess or cause to be assessed every such "person who makes default as aforesaid," that is to say they shall charge on him the tax which ought to be charged. This seems to me to assume that the result of the default has been a failure to assess, as also seems to be implicit in the use of the expression "increased tax," which in subsection (3) is said shall be added to the assessment. The assessment to which the commissioners must proceed under subsection (4) where, as in this case, there has already been a first assessment, will take the form of an additional first assessment under section 41 (1) (ii) where it is to be observed a similar expression is used, for it is provided that "the Additional Commissioners shall make an assessment on "the person chargeable, in an additional first assessment, in "such a sum as, according to their judgment, ought to be "charged . . . " Such an assessment is an assessment of the additional tax to which he ought to be duly assessed but has not been by reason of the default.

The phraseology of section 25 (3) is to be contrasted with that of section 48, which deals with the penalties which can be exacted in cases of fraud. It reads as follows: "(1) Where a person who "ought to be charged with tax, as directed by this Act, is not "duly assessed and charged by reason that he has," then there are four kinds of fraudulent conduct set out, "such person shall, "on proof thereof to the General Commissioners for the division "in which he has been charged, or, if he has not been charged, "then for any division in which he is chargeable, be assessed "and charged treble the amount of the charge which ought to "have been made upon him: Provided that, if any charge has "been made, but that charge is less than the charge which "ought to have been made, such person shall be assessed and "charged, over and above the former charge, treble the amount "of the difference between the charge which was made and the "charge which ought to have been made, such amount to be "added to the assessment. . . ."

I draw attention to the use of the past tense: "the amount "of the charge which ought to have been made" in section 48 as contrasted with the use of the present tense: "the tax which "he ought to be charged under this Act" in section 25 (3). Section 48 seems to me to express in clearer and lengthier language what is intended to be conveyed by the elliptical expression in section 25 (3), "the tax which he ought to be charged."

This construction of the subsection leads to the difficulty in determining at what point of time one must ascertain the amount of tax which he ought to be charged. The answer must, I think, be the date at which the proceedings, whether before the court or the General Commissioners, are brought. I am supported in this view by the provisions of section 55, to which I have already referred, which prohibit proceedings

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being brought if the matter has been remedied before the proceedings are started, but if proceedings are started before the matter has been remedied, leaves it to the discretion of the General Commissioners or the court as the case may be, as to whether the proceedings are then stayed.

In the present case, the proceedings were started on June 13, after the defendant had been charged with all the tax for which he was liable. There was therefore at the date of the proceedings no tax remaining on which he ought to be charged under the Act, nor was there any increased tax which could be added to the assessment had proceedings been brought before the General Commissioners instead of before the court. On the construction of the subsection which I have indicated appeals to me, the only amount recoverable under the subsection in this case would be the fixed penalty of £20.

Is there any authority which prevents me from adopting the construction which I have indicated is the one which I think is the better construction of this difficult subsection? Mr. Orr has referred me to the report of *Attorney-General* v. *Till* in the Court of Appeal[2] and in the House of Lords.[3] That was a case brought under section 55, the corresponding section of the Income Tax Act, 1842. The relevant distinction between that section and section 25 (3) of the Act of 1952 is that the words are in this form: "... if any person who ought by this Act to deliver any "list, declaration, or statement as aforesaid shall refuse or "neglect so to do within the time limited in such notice, ..." then he shall be liable to a penalty of £50 if prosecuted in any of Her Majesty's courts, and before the commissioners, "forfeit any "sum not exceeding £20 and treble the duty at which such person "ought to be charged by virtue of this Act ..." Therefore, so far as the penalty before the commissioners is concerned, they were substantially in the same terms as under the present Act, the other difference between the two Acts being that instead of there being an express reference to a true and correct return, there are the words "as aforesaid." In the Court of Appeal the view was taken by their Lordships that the words "as aforesaid" should not be construed as referring to a true and correct return, that is to say, as introducing the words "true "and correct" before "list, declaration or statement." The reasoning which appealed to the Court of Appeal in coming to that conclusion was an examination of the consequences which would follow if the section applied to cases where there had been an error, however slight or however innocent, in a return. For that reason the Court of Appeal came to the conclusion that on the true construction of section 55, the words "as aforesaid" did not introduce into the section the qualification "true and "correct."

The decision was reversed by the House of Lords, but as Mr.

[2] [1909] 1 K.B. 694; 25 T.L.R. 342.

[3] [1910] A.C. 50; 26 T.L.R. 134.

Orr has pointed out, two of the members of the Court of Appeal, Cozens-Hardy M.R. and Fletcher Moulton L.J., did express the view that the penalty exactable before the commissioners expressed in the terms "treble the duty at which such person "ought to be charged by virtue of this Act" did mean the whole of the tax payable by that person. I think Cozens-Hardy M.R.[4] must have taken that view because he points out that the penalty is greater than the penalty for fraudulent statements, and that was three times the tax on the difference. Fletcher Moulton L.J.[5] said in terms that that is the view he takes as to the meaning of the penalty section, and it was because, among other reasons, they thought the penalty was so largely exorbitant and so inappropriate in a case where there had been a minor error in a return that they came to the conclusion that the words "true "and correct" were not introduced.

The House of Lords[6] reversed that decision and they held that the words "as aforesaid" did introduce the words "true "and correct" as qualifying the return. Since the proceedings were proceedings for a penalty before the courts, it was limited to £50; it was not necessary for their Lordships in *Attorney-General* v. *Till*[7] to express any view as to the maximum amount of the penalty which could be recoverable before the commissioners, and accordingly no such view is expressed.

Mr. Orr, however, points out that none of their Lordships expressed any dissent from the view which the Court of Appeal had expressed as to what penalty was recoverable before the commissioners, but it was not of course necessary for their Lordships to do so. He has also drawn attention to a number of other passages in the speeches in which various of the members of the House of Lords draw attention to the high penalty which is exacted. I do not think, however, that I can find in that case any express indication that any of their Lordships have considered the possible alternative views as to the amount of the penalty.

I am, therefore, left with the opinions expressed in the Court of Appeal decision.[8] They are, I apprehend, obiter, and it was because of the absurd consequences of construing the section as imposing such a penalty that the Court of Appeal[8] felt compelled to hold that it did not apply to the sort of case where there had been an omission.

What the same members of the Court of Appeal would have held was the true amount of the penalty once they were constrained by the decision of the House of Lords to hold that the section did apply to a case of a minor omission I do not know, but I think it is clear that any court approaching a penalty section, and approaching a penalty section as I must approach it, on the view that it does apply to a minor omission such as

[4] [1909] 1 K.B. 694, 700.
[5] Ibid. 703.
[6] [1910] A.C. 50.
[7] Ibid.
[8] [1909] 1 K.B. 694.

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the defendant made in this case, must construe it in favour of the subject and against the size of the penalty, if the words are reasonably capable of such a meaning. I do not think therefore that there is any authority which constrains me to hold that the meaning for which Mr. Orr contends is to be preferred to the meaning which I have indicated, and which has the result of making the penalty more rational in relation to the default than the construction which Mr. Orr has put forward. I bear in mind the warning which has been given so many times, and which was given, indeed, in the House of Lords in *Attorney-General* v. *Till* [9] against being too hopeful of finding any rationality in the scheme set out under the Income Tax Acts. It does seem to me, however, that there is a construction which makes the scheme less irrational than another; it is one which I would prefer.

In my view, in the circumstances of this case, the plaintiffs are entitled to recover only the sum of £20.

Order accordingly.

Solicitors: *Solicitor of Inland Revenue.*

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[9] [1910] A.C. 50.

[PRIVY COUNCIL.]

J. C.*

1958 *Dec.* 15.

KINGSTON WHARVES LTD. . . . APPELLANTS;

AND

REYNOLDS JAMAICA MINES LTD. . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA.

Road Traffic — "Carriage" — Meaning — Tractor — Trailer — Wharfage—Statutory charges—Jamaica—"Heavy packages"—Wharfage Law, 1895 (*c.* 281 *Rev. Laws of Jamaica,* 1938; *c.* 412 *of* 1953 *Revision*), *ss.* 12, 16 (9); *Sch. A.*

Jamaica—Shipping—Wharfage—Charge.

Statute — Construction — Meaning of word — Contemporary usage — "Carriage"—(Jamaica) Wharfage Law, 1895, *s.* 12.

The Wharfage Law, 1895, of Jamaica, provides by section 12 for the payment of wharfage according to rates fixed in the Schedules, and Schedule A, as amended, provides: "Carriages, four wheels, "including wheels, each 22s. 6d. Carts and carriages of two wheels, "including wheels, each 9s."

By section 16 (9): "Any goods not particularly enumerated . . . "in the Schedules . . . shall be liable to be charged for in propor-"tion to the rates therein fixed: Provided, however, that in respect "of machinery and other heavy packages exceeding two tons in "weight the rates shall be fixed by special agreement."

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* *Present*: LORD MORTON OF HENRYTON, LORD COHEN, the RT. HON. L. M. D. DE SILVA.

Five tractors—propelled by internal combustion engines—each mounted on four wheels and each weighing 18,000 lbs., and five trailers for use therewith and each mounted on two wheels and each weighing 17,000 lbs., were imported into Jamaica by the respondent company and landed on the appellants' wharves. The respondents contended that the tractors and trailers were "car-"riages" of four and two wheels respectively, to which the rates in Schedule A applied, and that a total wharfage of £7 17s. 6d. was therefore payable:—

Held, that the tractors and trailers were not "carriages" to which the charges in Schedule A applied, but were goods "not "particularly enumerated . . . in the Schedules" within the meaning of section 16 (9) and, whether "machinery" or not, they fell within the term "heavy packages."

Observations of the Earl of Halsbury on "carriage" in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* [1903] 1 K.B. 405, at 412 and 413; 19 T.L.R. 225 considered.

APPEAL (No. 14 of 1957) from a judgment of the Court of Appeal of Jamaica (January 13, 1956) reversing a judgment of the Resident Magistrate's Court, Kingston (June 24, 1955), and holding that the respondents were entitled to recover £100 in an action brought by them against the appellants for that sum as money had and received by the appellants to the respondents' use.

The following facts are taken from the judgment of the Judicial Committee: The appellants, who were the defendants in the action, were wharfingers. The respondents, who were the plaintiffs, were a bauxite mining company. The respondents imported five Euclid tractors and trailers which were landed on November 28, 1951, on the appellants' wharves at Kingston, in Jamaica. The appellants demanded a sum of £139 6s. 5d. as wharfage payable to them. The respondents contended that only £7 17s. 6d. was payable. The respondents, anxious to prevent delay in delivery, paid the sum demanded under protest and sued in this action for the difference between the two sums. They limited their claim to £100 so as to bring it within the jurisdiction of the Resident Magistrate's Court.

The Resident Magistrate held that the amount demanded by and paid to the appellants was due as wharfage and dismissed the action. On appeal the Court of Appeal (Carberry C.J., Rennie and Cool-Lartigue JJ.) set aside that order and entered judgment for the respondents as prayed for. This appeal was from the judgment and order of the Court of Appeal.

An Euclid tractor was propelled by an internal combustion engine and was mounted on four rubber-tyred wheels. It weighed 18,000 lbs. A trailer weighed 17,000 lbs. and it was mounted on two rubber-tyred wheels. In use it was coupled with a tractor and constructed with a contrivance which enabled a load which it was carrying to be dumped down easily. These articles were imported for transporting bauxite-bearing earth to the respondents' processing plant within the respondents' premises but not for use on a public road.

The Wharfage Law of 1895 (Cap. 281 of the Revised Laws of

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Jamaica, 1938, Vol. IV, p. 3044; now C. 412 of the 1953 Rev'd. Ed.) made provision for the landing of goods and the payment of wharfage. Section 2 defined "wharfage" as the "payment "authorized by this Law to be demanded and received by any "wharfinger for and in respect of the use of his wharf by any "person and for services rendered thereat in respect of any goods "of such person."

Section 11 provided that every wharfinger should be obliged, to the extent of available accommodation, to receive goods, other than explosives, brought to his wharf.

Section 12 enacted, amongst other things, for the payment of wharfage "according to the rates fixed in one of the Schedules "A, B, C or D to this Law as applicable to the same." In Schedule A appeared the following items—"Carriages, four "wheels, including wheels, each 15s. Carts and carriages of "two wheels, including wheels, each 6s."

By Law 30 of 1951 the charges for these two items at the wharves in question were raised to 22s. 6d. and 9s. The respondents contended that these items were applicable to the goods, that the tractor was a "carriage" attracting wharfage at 22s. 6d. as it was on four wheels, and the trailer was also a "carriage" attracting wharfage at 9s. as it was on two wheels. The appellants denied the correctness of that contention. The Resident Magistrate rejected the contention. The Court of Appeal accepted it.

1958. November 17, 18. *T. G. Roche Q.C.* and *Peter Bristow* for the appellants.

Stanley Rees Q.C. and *Arthur Bagnall* for the respondents.

The following cases, in addition to the case referred to in the judgment, were cited in argument: *The Tasmania* [1]; *Karunaratne* v. *Ferdinandus*.[2]

December 15. The judgment of their Lordships was delivered by the RT. HON. L. M. D. DE SILVA, who stated the facts set out above and continued: The appellants arrived at the figure of £139 6s. 5d. on the basis of a scheme of charges drawn up in 1944 by an association known as the Shipping Association. No evidence was given as to the constitution and membership of this association other than that it comprises most of the shipping agents and wharfingers in Jamaica and that some of the directors of the appellant company are members. Under the scheme everything weighing one ton and upwards was classed under an item termed "heavy lift." The association is not a body to which the legislature has delegated the power to fix wharfage charges. The scale of charges fixed by the Shipping Association for "heavy lift" was—"1 ton up to under 2 tons, 9d. per 100

[1] (1890) 15 App.Cas. 223, 238. [2] [1902] A.C. 405, 409.

"lbs. plus 50 per cent. 2 tons and under 3 tons, 9d. per 100 lbs. "plus 75 per cent. 3 tons and upwards, 9d. per 100 lbs. plus "100 per cent."

The appellants in the argument before their Lordships sought to sustain the validity of the charges demanded and received by them on the ground that the goods were not covered by any of the items in the Schedules to the Law of 1895 and consequently came within the provisions of subsection (9) of section 16 which says: "Any goods not particularly enumerated and set forth in the "Schedules A, B, C and D annexed to this Law shall be liable "to be charged for in proportion to the rates therein fixed: Pro-"vided, however, that in respect of machinery and other heavy "packages exceeding two tons in weight the rates shall be fixed "by special agreement."

They argued further that the goods were "machinery" or "heavy packages" "exceeding two tons in weight" and that there had been a "special agreement" with regard to them. It was said that the Shipping Association scale of charges was open and notorious to all persons importing goods, that they constituted an offer to importers of goods and that if goods were landed on a wharf without a contract relating expressly to the goods the offer of the wharfingers must be deemed to have been accepted by the importer, and that in this way a "special agreement" within the meaning of the subsection would be constituted.

At the end of the argument the parties desired, as a matter of agreement, that if their Lordships came to the conclusion that the articles were "goods not particularly enumerated and set "forth in the Schedules" and that they were "machinery" or "heavy packages" within the meaning of subsection (9) of section 16 but that there had been no "special agreement" within the meaning of the subsection the appellants should be declared entitled to a fair and reasonable charge for the use of the appellants' wharf and for the services rendered by the appellants in respect of the tractors and trailers landed.

For reasons which follow, their Lordships have formed the view that the tractors and trailers in question do not fall for payment of wharfage charges under the item relating to "carriages" in Schedule A, and that they are goods "not "particularly enumerated and set forth in the Schedules A, B, "C and D" within the meaning of subsection (9) of section 16. They agree with the Court of Appeal that there has been no "special agreement" within the meaning of the subsection.

A "carriage" in its widest sense can be said to be something used for carrying persons, goods or something else. Their Lordships do not think the word "carriage" in the Law should be given this wide meaning having regard to the provisions of the Law and the schedules thereto, regarded as a whole. But even if this word is given this wide meaning their Lordships are of the view that a tractor cannot be said to be a carriage. The only thing it carries is the driver, but the purpose for which a

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tractor is used is not the purpose of carrying a driver. Their Lordships do not think that that which carries a driver for the purpose of driving it can for that sole reason be said to be a carriage.

In *Simpson* v. *Teignmouth and Shaldon Bridge Co.*[1] the Earl of Halsbury L.C. made an observation very relevant to the present case. He said that the word "carriage" in a statute should be interpreted to mean "what would, in an ordinary sense, "be considered to be a carriage (by whatever specific name it "might be called) in the contemplation of the legislature at the "time the Act was passed." Their Lordships find it difficult to imagine that, in however wide a sense the word "carriage" was used in the Law of 1895, the legislature could have intended articles of the weight and complexity of the tractors and trailers under consideration to be covered by the term. In this connexion another observation of Lord Halsbury in the same case has to be borne in mind. He was considering the word in a taxing statute and he said[2]: "it is not immaterial to observe what the "taxation was." In the Wharfage Law wharfage corresponds to tax and it is not immaterial to consider how the matter stands in respect of wharfage. The item, it will be seen, makes no reference to weight. It is difficult to imagine that the legislature could have contemplated the same amount being paid for a horse-drawn carriage and for a tractor weighing 18,000 lb.

The Court of Appeal, after quoting a passage from the judgment in the *Teignmouth* case[2] said: "It is true that there has "been a considerable development in that type of carriage since "the 1895 Law was passed, but if what is in the ordinary sense "known as a carriage at the time the legislature passed the Law "is still substantially within that definition by whatever name it "may now be called, we think that for the purposes of the "Wharfage Law it comes within the word carriage."

Their Lordships are unable to accept this reasoning. It appears to suggest that a tractor (and a trailer) would have been "in the ordinary sense known as a carriage at the time the legis-"lature passed the Law" if it had then been in existence. Their Lordships cannot accept this view. A suggestion that "wheels "made all the difference" was made in the course of the argument and is illustrated in a passage from the evidence of a witness who said: "Plaintiff firm contends that they are carriages. If a "mechanical crane has four wheels I would regard it as a "carriage. If it had no wheels I would regard it as machinery "falling under heavy lifts. A caterpillar tractor would be heavy "lifts. The wheels make the difference in my opinion." Their Lordships are unable to agree.

It was argued that there would be nothing extraordinary in regarding tractors and trailers as carriages because motor vehicles sometimes weighing up to 4,000 lbs. were rated as carriages.

[1] [1903] 1 K.B. 405, 413; 19 T.L.R. 225.

[2] [1903] 1 K.B. 405, 412.

This happens as a consequence of section 2 (2) of the Road Traffic Law (Chapter 310) which enacts: "Every motor vehicle shall be "deemed for any purpose to be a carriage within the meaning of "any Law of this Island and of any Rules, Regulations or Bye-"laws made under any Law of this Island, and if used as a "carriage of any particular class shall be deemed to be a carriage "of that class, and the Law relating to carriages of that class "shall apply accordingly." It would appear that for special considerations special provision was made for motor vehicles. The section just quoted gives some force to the argument that but for the statutory provision a motor vehicle would not be a "carriage."

It was sought for the first time on this appeal to argue that tractors and trailers were motor vehicles within the meaning of the Road Traffic Law. A motor vehicle is defined thus in the Law: "'motor vehicle' means any mechanically propelled "vehicle intended or adapted for use on roads." It must be presumed that the question whether the tractors and trailers were "motor vehicles" within the meaning of the statute had been considered by the respondents and their advisers for the purposes of the proceedings in Jamaica. It was not raised in the courts there, possibly for good reason. It cannot be entertained on this appeal as it involves questions of fact in addition to questions of law.

The conclusions of the Court of Appeal were founded partly on an examination of the history of the legislation which had to be applied. The relevant law is to be found as Chapter 281 in the Revised Edition of the Laws of Jamaica which came into force on August 1, 1938. This edition of 1938 came into being as the result of provision for revision made in the Revised Edition (Laws of Jamaica) Law appearing as Chapter 2 in the Revised Edition. Section 7 provided that the powers of revision conferred on the revising commissioner "shall not be taken to imply any "power in him to make any alteration or amendment in the "matter or substance of any Act or Law or part thereof." Consequently the Court of Appeal considered the law applicable as one that had been passed in 1895.

In the two items "Carriages, four wheels, including wheels" and "Carts and carriages of two wheels" the word "carts" appears for the first time in 1895 in the series of Laws dealing with wharfage. Upon a line of argument, which their Lordships do not think it necessary to repeat, the Court of Appeal came to the conclusion that the "intention of the legislature was that "carriages included carts" and that the word "carriages" was used as a generic term. As against this, an argument of great force arises—namely, that if the word "carriages" included carts there was no need to use the word "carts" at all and that its use for the first time in 1895 would be unintelligible except upon the basis that the word "carriage" was not used as a generic term including carts. On a consideration of this and other instances

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their Lordships, though conscious that the history of legislation can often throw a great deal of light, are of opinion that it does not in the present case afford inferences sufficiently clear and unequivocal as to what was in the mind of the legislature when it adopted the language which has now to be applied.

It is not contended, and it does not appear, that the articles in question are covered by any other item in the Schedules, and their Lordships are therefore of opinion that the articles are "goods not particularly enumerated and set forth in the "Schedules." Their Lordships find it unnecessary to decide whether or not the goods are "machinery" because they undoubtedly fall within the term "heavy packages."

There was no express agreement as to what wharfage should be paid for these articles. In one previous instance the respondents had been charged wharfage by the appellants for similar articles under the item relating to carriages. The appellants say that that charge has been made in error by one of their officers. The respondents had paid the "heavy lift" rates in the Shipping Association's rates on other goods, but not on goods of the same description as those now under consideration. A tacit agreement to pay the Shipping Association charges for these articles is not lightly to be inferred in these circumstances. The evidence is not strong enough to support the suggestion that the Shipping Association charges constituted an offer which the respondents must be deemed to have known and tacitly accepted. When the question of payment arose between the parties, the respondents at the very outset asserted that another basis of payment was the correct one. They had in fact been earlier charged on that basis. Their Lordships do not think that a "special agreement" within the meaning of subsection (9) of section 16 can be said to have been made.

As a consequence of the conclusions arrived at by their Lordships, and of the agreement between the parties, the appellants are entitled to reasonable remuneration for the use of their wharves and for the services rendered by them in respect of the tractors and trailers landed. The case should be sent back to the Resident Magistrate for this remuneration to be assessed on such material as may be put forward by the parties.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the decree of the Court of Appeal be set aside and the case sent back to the Resident Magistrate's Court for that court to assess what is a fair and reasonable charge for the use of the appellants' wharves and for the services rendered by the appellants in respect of the tractors and trailers landed on their wharves, and that judgment be entered on the basis that the sum so assessed was due to the appellants. The respondents must pay to the appellants two-thirds of their costs of this appeal and in the Court of Appeal. The Resident Magistrate, after determination of the sum payable to the appellants,

will make such order as he thinks right as to costs in respect of the original trial and in respect of the further inquiry now directed.

Solicitors: *Clifford-Turner & Co.; A. F. and R. W. Tweedie.*

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[HOUSE OF LORDS.]

INLAND REVENUE COMMISSIONERS . APPELLANTS;
AND
WOOD BROTHERS (BIRKENHEAD) LTD. . RESPONDENTS.

H. L. (E.)*
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Nov. 3, 4, 5; *Dec.* 18.

Revenue—Income tax—Balancing charge—"Actual income"—Whether balancing charge part of "actual income" for company surtax purposes—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 245, 255 (3), 292, 323.
Revenue—Surtax—Company.

The taxpayer, a company to which section 245 of the Income Tax Act, 1952, applied, ceased trading on April 28, 1951, and went into voluntary liquidation on April 16, 1952. The period over which it had to be taxed was April 30, 1950, to April 16, 1952, inclusive. It was not disputed that a balancing charge of £18,675 fell to be made on the company in respect of sales of plant and machinery on cessation of its business under section 292 (1) and section 323 (4) of the Income Tax Act, 1952, and that the actual income of the company from all sources, as computed for the purposes of Chapter 3 of Part IX of the Income Tax Act, 1952, for the relevant period fell to be apportioned among the members under sections 245 and 248 of the Income Tax Act, 1952:—

Held (Viscount Simonds and Lord Keith of Avonholm dissenting), that the amount of the balancing charge did not fall to be included in the actual income from all sources for the purposes of Chapter 3 of Part IX of the Act; the sum of £18,675 was not "actual income" of the company within the meaning of section 245.

Thomas Fattorini (Lancashire) Ltd. v. *Inland Revenue Commissioners* [1942] A.C. 643; [1942] 1 All E.R. 619 applied.

Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345 considered.

Decision of the Court of Appeal [1958] Ch. 476; [1957] 3 W.L.R. 713; [1957] 3 All E.R. 314 affirmed.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal by leave of the House of Lords from an order of the Court of Appeal dated October 4, 1957, dismissing an appeal by the appellants, the Commissioners of Inland Revenue,

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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from an order of the High Court (Harman J.) dated July 16, 1957, whereby an appeal by the appellants on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and the determination of the commissioners was affirmed. The question was whether the subject-matter of a balancing charge imposed on the respondent company, Wood Brothers (Birkenhead) Ltd. (in liquidation) under section 292 of the Income Tax Act, 1952, constituted a part of the "actual "income" of the respondent company in respect of which a surtax direction could be made under section 245 of the Income Tax Act, 1952.

The facts are fully set out in the opinion of Lord Reid.

Sir John Senter Q.C., *E. B. Stamp* and *Alan Orr* for the appellants.

F. H. Talbot Q.C., *Philip Shelbourne* and *M. Nolan* for the respondent company.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Attorney-General* v. *London County Council*[1]; *Inland Revenue Commissioners* v. *Barr*[2]; *Madras Electric Supply Corporation Ltd.* v. *Boarland*[3]; *Whitney* v. *Inland Revenue Commissioners*[4]; *Inland Revenue Commissioners* v. *John Dow Stuart Ltd.*[5]; *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners*[6] and *Townsend* v. *Electrical Yarns Ltd.*[7]

Their Lordships took time for consideration.

December 18. VISCOUNT SIMONDS. My Lords, I am so fully in agreement with the opinion of my noble and learned friend, Lord Keith of Avonholm, that I can be very brief in stating my own views. Nor shall I occupy your Lordships' time in stating the many sections of the Income Tax Act, 1952, to which reference was made in the course of the argument. The Act contains over 500 sections and 25 Schedules. A considerable number of them were relied on by one side or the other. The question is in fact a very short one. It is whether the amount in respect of which a so-called balancing charge was properly made upon the respondent company under sections 292 (1) and 323 (4) of the Act was part of its actual income from all sources for the relevant period within the meaning of section 245 of the Act. If so, that amount was apportionable among the members of the respondent company, and the apportionment made by the Special Commissioners was properly made. But it has been

[1] [1907] A.C. 131; 23 T.L.R. 390.
[2] [1954] 1 W.L.R. 792; [1954] 2 All E.R. 218.
[3] [1955] A.C. 667; [1955] 2 W.L.R. 631; [1955] 1 All E.R. 753.
[4] [1926] A.C. 37; 42 T.L.R. 58.
[5] [1950] A.C. 149; [1950] 1 All E.R. 1.
[6] 1922 S.C.(H.L.) 112; 12 T.C. 427.
[7] [1952] 1 T.L.R. 728; [1952] 1 All E.R. 918.

held by Harman J. upon a case stated by the commissioners and, for different reasons, by the Court of Appeal, that the amount in question ought not to be regarded as part of its actual income for the period in question.

The argument was twofold: first, as was held by the Court of Appeal, that no statutory enactment provided that the amount on which the balancing charge was assessed should be deemed to be income of the company for income tax purposes; and, secondly, that, in any case, it was not part of the actual income of the company from all sources. If the first argument prevailed, the second argument was unnecessary: it was not suggested that the amount in question could be actual income of the company if it was not income at all.

My Lords, it appears to me that the construction placed by the Court of Appeal upon the relevant sections of the Act is too narrow. The purpose of the balancing charge is not in doubt. I respectfully adopt the language of my noble and learned friend, Lord Morton of Henryton, in the recent case of *Kirkness* v. *John Hudson & Co. Ltd.*[1]: "Conversely, if the moneys received on the "sale were in excess of the written-down value of the asset, a "'balancing charge' was imposed, in order to restore to the "public revenue the amount by which the past allowances were "shown to have been excessive." The allowances were made in respect of the computation of profits or gains for purposes of income tax; the part of the public revenue affected was that which was derived from income tax, and the balancing charge is made in order to restore to that tax an amount by which it has been mistakenly reduced. Call it notional or artificial or what you will. It is an amount which, for the purpose of income tax, is as truly part of the subject's income as is, for instance, the notional or artificial amount which is under Schedule A regarded as his income. My noble and learned friend, Lord Keith of Avonholm, will exhaustively examine the relevant sections. I hope, therefore, I may not be thought to be wanting in respect to those who take a different view, if I say that, in my opinion, the solution of the problem lies in remembering that in the Act the word "income" has a special meaning, namely, a sum which is by the Act charged to income tax and measured in accordance with its provisions and that, specifically, where Case I of Schedule D is in question, "profits and gains" is an expression synonymous with "income." It is because the amount, on which the balancing charge is assessed, falls within that Case that it is brought into charge as income. I do not wish to elaborate what my noble and learned friend will say, but I cannot refrain from observing upon the incongruity of the conclusion to which, in the case of a company, the Court of Appeal has come with the result in the case of an individual trader. His surtax liability appears to be concluded by section 524 (4) of the Act. I agree, too, that no little weight

[1] [1955] A.C. 696, 716; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345.

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should be attached to the language of section 270 (6) (*c*). In that subsection, quite naturally and, in my opinion, rightly, that "which is the subject of a balancing charge under this Chapter" is called "income." So, in my opinion, it is for all the purposes of the Act.

But it remains to determine whether it is "actual" income within section 245. This expression is defined in section 255 (3). I do not think it necessary to look beyond its terms. It clearly has a purely temporal significance: it means income as defined, computed and measured by the Act but by reference to a particular period. That is in accordance with what Lord Atkin said in *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners*,[2] and it is perhaps permissible to add that, if it means anything else, there is no guide to what it does mean.

I would only add that I agree with the observations of my noble and learned friend, Lord Morton of Henryton, upon what Lord Uthwatt said in *Lord Howard de Walden* v. *Inland Revenue Commissioners*.[3]

I would, therefore, allow this appeal, but, as I understand that the majority of your Lordships think otherwise, it must be dismissed.

LORD MORTON OF HENRYTON. My Lords, the parties in this case agree: (1) that a "balancing charge" was properly made upon the respondent company under sections 292 and 323 (4) of the Income Tax Act, 1952; (2) that "the amount on which the "balancing charge is made" was correctly computed, under the same provisions of that Act, at the sum of £18,675; (3) that on the true construction of the Act, once the amount on which the balancing charge is made has been ascertained, the balancing charge is income tax on that amount at the appropriate rate.

The one question which remains for decision is whether the sum of £18,675 already mentioned is or is not part of the "actual "income from all sources" of the respondent company for the relevant period, within the meaning of section 245 of the Act. If this question is answered in the affirmative, it follows that a direction and apportionment has been properly made under section 245, with the result that the members of the company are liable to pay any appropriate amount of surtax on the sums apportioned to them respectively.

Counsel for the company submitted, first, that the £18,675 was not "income" of the company within the meaning of section 245, and, secondly, that, if this sum could properly be described as income, it was not *actual* income within the meaning of the section.

My Lords, I would accept counsel's first submission.

I have had the pleasure of reading the speech which is about to be delivered by my noble and learned friend, Lord Reid. I

[2] [1942] A.C. 643; [1942] 1 All E.R. 619.

[3] [1948] 2 All E.R. 825; 30 T.C. 345.

entirely agree with his reasoning and conclusion, and I shall only add some observations upon certain passages in speeches delivered in this House which were much discussed in the course of the argument. In *Thomas Fattorini (Lancashire) Ltd.* v. *Inland Revenue Commissioners*[4] Lord Atkin said: "Actual "income does not mean the specific receipts that come in from "time to time, but the 'income tax income' as calculated at the "end of the year of assessment. To hold otherwise would make "nonsense of the section when applied to commercial companies, "who use their receipts as soon as they come in, and hardly "ever have left for distribution the actual incomings as sought "to be defined in the argument." In *Lord Howard de Walden* v. *Inland Revenue Commissioners*[5] Lord Uthwatt said: "My "Lords, for myself I am content to take the view that in light "of the context the words 'actual income' can mean only "income which is in some real sense capable of distribution. "Apart from that context, indeed, the phrase 'actual income' "is hardly apt to include fictional income, and non-existent "income composed of amounts deemed to be income is fictional "income." In each case these observations were directed to the words "actual income" in section 21 of the Finance Act, 1922, but the wording of that section does not differ in any material particular from the wording of section 245 in the Income Tax Act, 1952, and paragraph 6 of Schedule I to the Finance Act, 1922, is reproduced in section 255 (3) of the Act of 1952.

My Lords, when Lord Atkin, in *Fattorini's* case,[6] used the words which I have just quoted, he was dealing with an argument which had been pressed on the House by counsel for the appellant, and he was concerned only to reject the contention that "actual income" meant the specific receipts of the company. It would not be right to construe his words as an expression of opinion that every sum upon which income tax is payable is necessarily "actual income" within the meaning of the section, and unless his words can be so construed they do not assist the argument of counsel for the appellant in the present case. In the *Howard de Walden* case[7] Lord Uthwatt was dealing with a contention that where actual income from all sources of company No. 1 is attributed to company No. 2 as the result of an apportionment, that attributed income is part of the actual income from all sources of company No. 2, so that it could be further apportioned, under section 21 of the Finance Act, 1922, to the shareholders of company No. 2. In rejecting that contention, he pointed out, as did Asquith L.J. (as he then was) in the Court of Appeal, that if the contention were right, section 32 of the Finance Act, 1927, which provides for such sub-apportionment, would have been unnecessary. I do not think it would be right to treat the words of Lord Uthwatt which I have quoted as

[4] [1942] A.C. 643, 658.
[5] [1948] 2 All E.R. 825, 831; 30 T.C. 345, 370.
[6] [1942] A.C. 643, 658.
[7] [1948] 2 All E.R. 825; 30 T.C. 345.

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amounting to a decision on any question wider in its scope than the question with which he was dealing, and it is noteworthy that he did not refer in his speech to the provisions as to computing the "actual income" which were then contained in paragraph 6 of Schedule I to the Finance Act, 1922, and are now in section 255 (3) of the Income Tax Act, 1952.

I would dismiss the appeal.

LORD REID. My Lords, the respondent company carried on business as wholesale grocers until April 28, 1951. On that date it sold its business and ceased to trade. Then on April 16, 1952, it went into voluntary liquidation. On March 11, 1955, the Special Commissioners of Income Tax, in pursuance of section 245 of the Income Tax Act, 1952, directed that for the purposes of assessment to surtax the actual income of the company from all sources for the period April 30, 1950, to April 16, 1952, should be deemed to be the income of the members of the company. It is admitted that the commissioners were entitled to give that direction for that period.

On the same day, March 11, 1955, the commissioners, in pursuance of section 248 (1) of the Act, apportioned the actual income of the company for that period among the members. They determined the amount of the actual income to be apportioned as £76,264. No objection is taken to the method of apportionment. The sole question in this appeal is whether the commissioners were entitled to take that sum as the actual income of the company for that period. That sum includes a sum of £18,675, and the respondent contends that this sum was not part of the actual income of the company within the meaning of section 245 of the Act, and that the commissioners were therefore only entitled to apportion among the members the sum of £57,589. The respondent's contention was upheld by the Commissioners for the Special Purposes of the Income Tax Acts, who accordingly, on April 23, 1957, reduced the amounts apportioned to a total of £57,589. An appeal by the present appellants was dismissed by Harman J., and a further appeal was dismissed by the Court of Appeal on October 4, 1957.

The sum of £18,675 is the amount on which a balancing charge was made on the company under sections 292 and 323 of the Act in respect of its sales of plant and machinery on its ceasing to carry on business. It is admitted that this sum was correctly calculated and that the company was properly assessed in respect of it. The question whether a sum on which a balancing charge is made is or is not part of "actual income" depends on the proper interpretation of the sections of the Act which deal with those matters; but it will, I hope, make my subsequent observations rather more intelligible if I first try to indicate in outline the apparent purpose of the Act in providing for balancing charges.

Before 1945 there was statutory provision for allowances for depreciation or wear and tear of plant and machinery under rule 6

of the rules applicable to Cases I and II of Schedule D. If one assumes values in money remaining stable, the amount of the allowances on any item ought to be such that, when the trader comes to sell it, the price which he receives is equal to the price which he paid for it less the aggregate amount of the allowances which he has received in respect of it. If on selling the item he receives more than that amount, then, neglecting the effect of inflation, it could be said that the allowances made to him had been too large, and, as these allowances had been deducted year by year before assessment of his trading profits, he had therefore paid too little in income tax. Before 1945 there was no provision in the Income Tax Acts which enabled the Revenue to recover anything from the trader when the price which he received on the sale of an item showed that the trader had benefited in the past at the expense of the Revenue by having been granted too large allowances. And in the converse case, where the price received on sale showed that past allowances had been too small, there was no provision to enable the trader to receive a further allowance.

To put this right was clearly one of the objects of the elaborate code enacted in the Finance Act, 1945, and now set out in Part X of the Act of 1952. "Balancing charges" were introduced to meet the case where the trader had received too large allowances in the past, and "balancing allowances" were introduced to meet the converse case. The provisions of the Act of 1952 are so elaborate that the scheme may appear more clearly if I only quote those parts of the sections which appear to me to be directly relevant in the present case. Balancing charges and allowances are first dealt with in section 292, which provides: "(1) Subject "to the provisions of this section, where any of the following "events occurs in the case of any machinery or plant in respect "of which an initial allowance or an annual allowance has been "made for any year of assessment to a person carrying on a "trade, that is to say, either—(*a*) the machinery or plant is sold, "whether while still in use or not; or . . . and the event in "question occurs before the trade is permanently discontinued, "an allowance or charge (in this Chapter referred to as 'a "'balancing allowance' or 'a balancing charge') shall, in the "circumstances mentioned in this section, be made to, or, as the "case may be, on, that person for the year of assessment in his "basis period for which that event occurs . . . (2) Where there "are no sale, insurance, salvage or compensation moneys or "where the amount of the capital expenditure of the person in "question on the provision of the machinery or plant still un-"allowed as at the time of the event exceeds those moneys, a "balancing allowance shall be made, and the amount thereof "shall be the amount of the expenditure still unallowed as afore-"said, or, as the case may be, of the excess thereof over the said "moneys. (3) If the sale, insurance, salvage or compensation "moneys exceed the amount, if any, of the said expenditure still

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"unallowed as at the time of the event, a balancing charge shall "be made, and the amount on which it is made shall be an "amount equal to the excess or, where the said amount still "unallowed is nil, to the said moneys: . . ." Subsection (4) then provides that in no case shall the amount on which a balancing charge is made exceed the aggregate of the allowances previously made to him in respect of the machinery or plant sold.

That section determines the amount on which a balancing charge is to be made. The way in which a balancing charge or a balancing allowance is made is provided by sections 301 and 323, of which the relevant parts are as follows:

"301.—(1) Any allowance or charge made to or on any person "under the preceding provisions of this Chapter shall . . . be "made to or on that person in charging the profits or gains of his "trade.

"323.—(1) Any claim by a person for an allowance falling "to be made to him under any of the provisions of this Part of "this Act in charging the profits or gains of his trade shall be "included in the annual statement required to be delivered under "this Act of the profits or gains thereof, and the allowance shall "be made as a deduction in charging those profits or gains. . . . "(4) Any charge falling to be made under any of the provisions "of this Part of this Act on a person for any year of assessment "in charging the profits or gains of his trade shall be made by "means of an assessment on the profits or gains of that trade "for that year of assessment in addition to any other assessment "falling to be made thereon for that year."

I must now set out section 245 of the Act under which the commissioners gave their direction, and section 255 (3) which deals with the manner of computation of the actual income of the company—the question at issue in the present case. Those sections are as follows: "245. With a view to preventing the "avoidance of the payment of surtax through the withholding "from distribution of income of a company which would other-"wise be distributed, it is hereby enacted that where it appears "to the Special Commissioners that any company to which this "section applies has not, within a reasonable time after the end "of any year or other period for which accounts have been made "up, distributed to its members, in such manner as to render "the amount distributed liable to be included in the statements "to be made by the members of the company of their total "income for the purposes of surtax, a reasonable part of its actual "income from all sources for the said year or other period, the "Commissioners may, by notice in writing to the company, direct "that, for purposes of assessment to surtax, the said income of "the company shall, for the year or other period specified in the "notice, be deemed to be the income of the members, and the "amount thereof shall be apportioned among the members."

"255.—(3) In computing, for the purposes of this Chapter, "the actual income from all sources of a company for any year

"or period, the income from any source shall be estimated in "accordance with the provisions of this Act relating to the com-"putation of income from that source, except that the income "shall be computed by reference to the income for such year or "period as aforesaid and not by reference to any other year or "period."

With regard to the meaning of the phrase "actual income "from all sources," counsel referred to *Fattorini's* case [8] and the *Howard de Walden* case.[9] But the circumstances in those cases were quite different from those in the present case, and I can get little assistance from what was said by Lord Atkin in the former case and by Lord Uthwatt in the latter case. It appears to me that in the present case I must take section 255 (3) and determine whether, in making a computation of the actual income of the company from all sources in the manner there directed, the sum subject to the balancing charge does or does not fall to be included. If it does, then the appellants succeed, but if it does not, then this appeal must be dismissed.

Nothing turns in this case on the last part of this subsection, but this part of the subsection may afford an explanation of the choice of the word "actual" in the phrase "actual income" in this subsection and in section 245. This subsection was originally paragraph 6 of Schedule I to the Finance Act, 1922, which by section 21 first enacted the provisions which now form section 245 of the Act of 1952. In 1922 trading profits were still computed on a three years' average and the last part of this subsection then read "except that the income shall be computed "by reference to the income for such year or period as aforesaid "and not according to an average of more than one year or by "reference to any year or period other than such year or period as "aforesaid." So it is possible that the phrase "actual income" was there used to emphasise the fact that the income to be considered under section 21 was the income for a particular year and not income computed on a three years' average. But whether that be so or not, section 255 (3) in effect provides a definition of what is meant by "actual income": it directs how actual income is to be computed and, in my opinion, nothing can be included in actual income unless it can be brought within the words "income from any source . . . estimated in accordance "with the provisions of this Act relating to the computation of "income from that source."

It was argued for the appellants that the sum made subject to the balancing charge was income and that its source was the trade carried on by the company. Even if that were so, the question would still arise—Was this sum income estimated in accordance with the provisions of this Act relating to the computation of income from the company's trade? The ordinary provisions relating to the computation of trading income are those

[8] [1942] A.C. 643.

[9] [1948] 2 All E.R. 825; 30 T.C. 345.

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which relate to Schedule D, Case I, and they have nothing to do with balancing charges. So it appears to me that the question then is this—Can the provisions of sections 292, 301 and 323 properly be regarded as provisions of the Act relating to the computation of income from trade? I do not wish to overstress what has so often been said in this House to the effect that no tax can be imposed on a subject without words in an Act clearly showing an intention to lay a burden on him. If it appears by clear implication that the provisions of these sections should be so regarded, that would, I think, be sufficient, and I shall therefore turn back to these sections to consider whether their terms afford sufficient ground for any such implication.

Section 292 deals with the computation of the sum on which a balancing charge is to be made. Three things are to be taken into account in the case of a sale of plant or machinery—the price originally paid for it, the price received for it on sale, and the aggregate of past allowances made in respect of it. The original cost less the past allowances is the "expenditure still unallowed." The sum made subject to the balancing charge is not in any normal sense income. The machinery or plant with reference to which it is calculated was a capital asset, and the cost of acquiring it was capital expenditure. So far as I can see, the only way in which the sum made subject to the balancing charge is related to income in the ordinary sense is that it represents a part, or it may be the whole, of the allowances made in past years, and that in those years those allowances were brought in as deductions after profits had been computed so as to reduce the trader's taxable income. So it has a relation to the trader's taxable income in past years but no relation to his "actual "income" for the year in question. This section does not provide expressly or by clear implication that the sum on which a balancing charge is made is to be deemed to be, or to be treated as, a trading receipt, nor does it provide that it is to be part of or to be aggregated with the trading income for the year in question. So far as this section is concerned this sum is left to stand by itself.

This is in striking contrast with the provisions of section 337, which deals with a comparable matter, the sale of an asset representing scientific research expenditure of a capital nature. There it is provided by subsection (2) (*b*) that, if the proceeds of sale plus the allowances exceed the original cost, the excess or the amount of the allowances, whichever is the less, "shall be "treated as a trading receipt of the trade accruing at the time of "the sale." That provision was first enacted by the Finance Act, 1944, section 29, and it was therefore before the eyes of the draftsman and of Parliament when balancing charges were first introduced.

The other two sections on which the argument for the appellants was chiefly founded are sections 301 and 323. They must, I think, be taken together. They deal not with computation but

with the method of assessment of the balancing charge. The former provides that the charge is to be made in charging the profits or gains of the trade, and this is expanded by section 323 (4), which provides that it is to be made by means of an assessment on the profits and gains and that this assessment is to be in addition to any other assessment thereon for the year.

To my mind, the question is whether these sections clearly designate the sum made subject to the balancing charge as part of the trading income for the year in question, or whether they merely provide, as a matter of machinery, that the balancing charge shall be charged and assessed as if it was a charge on that trading income. It is, I think, of some importance that the assessment by means of which the charge is made is to be separate from the assessment in respect of trading profits. If it was intended that the sum made subject to the balancing charge should be treated for all purposes as part of the trading income for the year in question, counsel were unable to suggest any reason why there should be this double assessment, and no reason occurs to me. Indeed, it would rather seem that the draftsman has deliberately avoided anything that could suggest that sums made subject to balancing charges are part of trading income for the year in question.

Then an argument was founded on section 1 of the Act. This section links the annual Finance Acts with the Income Tax Act by providing that tax at the rates there enacted shall be charged for each year in respect of all property, profits or gains described or comprised in the Schedules. It was argued that unless the sum made subject to a balancing charge could be said to be described or comprised in Schedule D—it could not be in any other Schedule—then no tax on it could be recovered. So it was said that the intention must have been to make this sum a part of the trading income for the year in question—the only way in which it could become comprised in Schedule D. I am not at all satisfied that that is so. I think that a sufficient link between a balancing charge and the annual Finance Acts could be found in the provisions of section 323 (4) that the charge shall be made by means of an assessment on the profits or gains of the trade for that year. An assessment for a particular year can only be at the rates enacted in the current Finance Act. And if the intention was, not to enact that the sum made subject to a balancing charge is to be deemed to be income for all purposes, but merely to enact that for the particular purpose of this assessment it should be treated as if it were trading income of the year in question, then I think that those provisions were appropriate for that purpose.

Then it was argued that anything made subject to income tax must necessarily be income for all the purposes of the Act. Reference was made to the familiar passage in Lord Macnaghten's

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speech in *London County Council* v. *Attorney-General*[10] beginning: "Income tax, if I may be pardoned for saying so, is a tax "on income. It is not meant to be a tax on anything else." No doubt that was so in 1901. Apart from Schedule A everything that was taxed at that date was income in the ordinary sense, and if a landowner, instead of drawing income from rent, occupied his own property, he was enjoying money's worth of an income character. But now income tax is sometimes meant to be a tax on something which is not income. For example, section 318 charges income tax in certain circumstances on capital sums received for the sale of patent rights and it does so by making such sums chargeable under Case VI of Schedule D.

I do not think that much can be inferred from any general statement equating sums charged to income tax with income. For some purposes it may be convenient and not incorrect to do this. Counsel for the appellants attached importance to the fact that section 270 (6) (*c*) refers to "income which is the subject "of a balancing charge under this Chapter." The context there is that certain allowances are to be available primarily against "the following income," and then there are specified incomes taxed under Schedule A and certain income taxed under Schedule D, Case VI. This appears to be the only place in the Act where the word "income" is used in connection with sums made subject to balancing charges. The word appears to me to be used here as mere description and to signfy no more than that the sums in question are chargeable to income tax. But even if the use of the word "income" in this rather unimportant subsection had some general significance, it would not go to the real point in this case. The question in this case is not whether a sum made subject to a balancing charge is income in some general sense but whether it is actual income within the meaning of sections 245 and 255 (3). After a close examination of all the sections relied on, in light of the argument submitted for the appellants, I can find nothing sufficient to bring sums made subject to a balancing charge within the scope of the term "actual income" in section 245.

My Lords, I fear that I have taken up much time with technical argument. I have done so because income tax is a highly technical subject. But if I took a broader view of the case I should reach the same result. Under section 245 it is the commissioners' duty to determine whether the company has within a reasonable time distributed to its members a reasonable part of the income to which the section applies. One would therefore expect the section to apply to income which is in fact capable of distribution, and this expectation would be confirmed by the fact that the section purports to deal with "actual "income." It is true that when one comes to section 255 (3) one finds by its terms actual income can include some items

[10] [1901] A.C. 26, 35; 17 T.L.R. 131.

which, although they are income in the sense in which Lord Macnaghten used the word, are not money in the hands of the company capable of immediate distribution. But it is a long step from that to find that the section also includes in actual income a new kind of subject which was not chargeable to income tax when the section was first enacted, and which is not income in any ordinary sense of the word. Of course, if Parliament has made it clear that the section is to apply, then the section must be applied, though it is not easy to see how the commissioners, acting reasonably as they must, could take such a sum into account in carrying out their duty under the section to consider whether a reasonable part has been distributed. This novel kind of "income" has been made chargeable to income tax, no doubt for good reasons. But I would not think that that fact raises any presumption that section 245 also applies to it. Regarding the whole matter in this way, far from finding any clear indication of an intention to bring these sums within the scope of section 245, I would not find it possible to reach that result without devious and dubious argument. I am, therefore, of opinion that this appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, we are concerned here with a direction and apportionment made by the Special Commissioners under sections 245 and 248 of the Income Tax Act, 1952, reference to undistributed income of the respondent company, which went into voluntary liquidation on April 16, 1952. Much discussion has centred on the meaning of "actual income" in these sections. In my opinion, "actual" here has a temporal significance and relates to income from all sources for the year or period to which the direction relates and not to income computed by reference to any other year or period. This, I think, is clear from the language of section 255 (3) of the Act. The accounts of the company since April 29, 1950, had not been certified by the company's auditors prior to the liquidation, and it is common ground that the relevant period under consideration is April 29, 1950, to April 16, 1952, by reason of the terms of section 253 of the Act. Under that section the income of the company for that period is, for the purposes of section 245, deemed to be income available for distribution to the members of the company.

The short question in the case is whether money received by the company from the sales of certain plant and machinery in excess of the written-down value from allowances previously given for purposes of tax is income of the company for the relevant period within the meaning of sections 245 and 253 of the Act. The company sold its business and ceased trading on April 28, 1951. The plant and machinery was sold on the cessation of its business. It is common ground that in respect of this sale a balancing charge falls to be made on the sum of £18,675 under the provisions of sections 292, 301 and 323 of the Act of 1952.

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The year of assessment for the balancing charge is fixed by reference to the company's "basis period" for which the event occurred, in this case April 6 to April 28, 1951.

My Lords, it would seem that the income of the company from all sources means income of the company from any source brought into charge for income tax under the Act of 1952. The only source suggested in the present case is the trade of the company, the profits or gains of which are brought into charge under Schedule D. The Revenue say the subject-matter of the balancing charge, namely, £18,675, is such a profit or gain. The respondent company say it is not. This sum represents excess allowances that have been given to the company in previous years under the provisions of the Act of 1952, or previous Acts, including the Income Tax Act, 1918, making to traders allowances in respect of the capital cost of machinery and plant and which were given as deductions from profits and gains brought into charge for tax. Under the Act of 1918 no provision was made for recoupment to the Revenue if it should ultimately be found, on sale of an asset or otherwise, that an excessive allowance had been made, whereas under the present Act provision is made for such a case, in the shape of a balancing charge, and also, where it is found that too small an allowance has been given to the trader in past years, for giving him further relief in the shape of a balancing allowance. Section 292 of the Act is the section that provides the measure for computing the amount of the balancing allowance or the amount on which a balancing charge falls to be made. This section has been previously considered in this House and elsewhere, and I find it unnecessary to examine its provisions in further detail. It is agreed that the sum subject to the balancing charge, namely, £18,675, has been correctly computed. I would refer, however, to what have been called the relevant charging provisions of the Act, though they might more appropriately be called the relieving and charging provisions. Section 301 (1) says "Any allowance or charge made to or on any person under "the preceding provisions of this Chapter shall . . . be made to "or on that person in charging the profits or gains of his trade." Section 323 (1) provides: "Any claim by a person for an allow-"ance falling to be made to him under any of the provisions of "this Part of this Act in charging the profits or gains of his trade "shall be included in the annual statement required to be "delivered under this Act of the profits or gains thereof, and the "allowance shall be made as a deduction in charging those profits "or gains." Subsection (2) provides for carrying forward the allowance or part thereof to succeeding years where the profits or gains of a year are insufficient to permit full effect being given to the deduction. Subsection (4) reads: "Any charge falling to "be made under any of the provisions of this Part of this Act on "a person for any year of assessment in charging the profits or "gains of his trade shall be made by means of an assessment on "the profits or gains of that trade for that year of assessment in

"addition to any other assessment falling to be made thereon for "that year."

I pause at this point to ask what is there that fixes the rate at which the balancing charge falls to be made on the profits or gains of the trade? There is nothing in the Act that fixes the rate expressly. It is, however, common ground that the rate is the standard rate of income tax for the basis period. I see no way of bringing in that rate except through section 1 of the Act which applies the rate of income tax fixed by any Act for any year to all property, profits or gains of that year comprised in the Schedules to the Act of 1952. It is hardly necessary to refer to repeated observations in this House and elsewhere that income tax is a tax on income. And if a balancing charge is to be regarded as a tax on income, it is a short step to take, to regard the amount on which it is levied as income arising, in the present case, from a transaction in the course of trade. If it is not income within one or other of the Schedules of the Act, I can see no authority for levying any rate of income tax on the amount computed as subject to a balancing charge. It is said that a change has taken place in the outlook of income tax legislation, and that all receipts which are subject to tax are not necessarily income receipts. It is true that a somewhat exceptional course seems to have taken place under section 318 of the Act in the case of the sale of patent rights for a capital sum. But a particular exception in the case of so special a matter as the sale of patent rights does not, in my opinion, detract from the general principle to which I have referred.

The scheme generally of the relevant statutory provisions seems to me to be to allow to be charged against the revenue side of a trading account depreciation in respect of wear and tear of capital assets, and on the sale or otherwise of these assets either to restore to revenue what has been found to have been unnecessarily charged for depreciation or to allow a further charge against revenue if it is found that insufficient depreciation has been allowed. I should not have thought that this would be contrary to sound commercial and accountancy principles, but whatever may be commercial or accountancy practice, I think the object of the Act was to secure that the subject-matter of the balancing charge should be treated as an income profit subject to tax and not as a capital profit free from tax. If this be so, then the sum of £18,675 should properly be regarded as a receipt credited to revenue, though arising out of a capital transaction, and as it would go to increase the profits and gains of the trade and arise out of the trade, it should form part of the income of the company for the purposes of section 245.

The weight of the argument for saying that this sum is not such income seems to rest on the language of section 323 (4), which levies the balancing charge by an assessment on profits and gains additional to any other assessment on the profits and gains. Any other assessment would include income tax under Schedule

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D. Therefore, so the argument would seem to run, this sum cannot be income from any source recognized as giving rise to a liability to income tax under the Act. This I find difficult. The more natural meaning, in my opinion, is that this is a supplementary assessment of the same nature and origin as the tax levied under Schedule D, and imposed because the subject-matter of the charge is regarded as an addition to the profits or gains of the trade. Thus we find a reason, difficult otherwise to explain, for fixing the rate of charge at the appropriate income tax rate for the basis period. Moreover, the balancing charge cannot be considered without reference to its correlative, the balancing allowance. The balancing allowance has the effect of reducing the amount of profits and gains brought into charge for tax. Is it to be said that the income of a company for the purposes of section 245 are the profits and gains before deduction of the balancing allowance? I think not. But the balancing allowance proceeds from the same kind of transaction as may give rise to a balancing charge. The considerations, in my opinion, are the same in each case. The balancing allowance results in a reduced assessment. In the case of a balancing charge an extra assessment is made and the result is the same as if a single assessment was made on the sum of the profits and gains plus the amount brought in as subject to a balancing charge. What has been allowed unnecessarily as a deduction from profits and gains for the purposes of tax is to be subject to the same kind of tax when brought back into account. In my opinion, the sum here in question is just an additional profit or gain of the company subject to tax under Schedule D of the Act.

I derive little assistance from various other sections of the Act which were referred to in the course of the hearing, and find in them nothing to militate against the view I have expressed. Some reliance was placed by the respondent on section 337 of the Act inasmuch as it expressly provides that certain proceeds from the sale of an asset representing scientific research expenditure of a capital nature shall be treated as a trading receipt of the trade. This argument I find somewhat double edged. In any event, the section finds place in a separate Part of the Act, Part XI, devoted to "Relief for Expenditure on Scientific Research," and I should hesitate to draw any inference from Part XI in considering the effect of Part X of the Act. Of greater significance, in my opinion, is the reference in section 270 (6) (*c*) to "income which is the subject of a balancing charge under this "Chapter," which appears in the same Part of the Act as that covering allowances in respect of machinery and plant. Section 270 appears in Chapter I of Part X of the Act but Chapters I, II and III of Part X are all modelled on the same pattern and bring in balancing allowances and balancing charges which, in principle, differ in no material respect in any one of these chapters. The separation into chapters is due to the different nature of the assets dealt with and leads to the same results in each case.

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Lastly, it may be noted that where an individual trader has been assessed to tax at the standard rate for any year of assessment, the assessment will be final and conclusive, under section 524 (4) of the Act, in estimating his total income. This would seem to be conclusive as to his surtax liability. It would be at least strange that where an individual's surtax liability emerged through his interest as a shareholder in a trading company under the surtax provisions of Part IX of the Act a different result should be reached.

On all considerations I am of opinion that the determination of the commissioners is wrong, and that the appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinions of my noble and learned friends, Lord Morton of Henryton and Lord Reid. I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons for March, Pearson & Green, Manchester.*

F. C.

[COURT OF CRIMINAL APPEAL.]

REGINA *v.* CUNNINGHAM.

C. C. A.

1958 *Dec.* 8.

Lord Parker C.J., Cassels and McNair JJ.

Criminal Law—Wounding—Provocation—Whether a defence.

The defence of provocation is available only to a person charged with murder in order to reduce the charge to manslaughter.

Where, therefore, the appellant was charged with malicious wounding and he put forward the defence of provocation consisting of words spoken to him by the person injured:—

Held, that the defence of provocation was not open to him.

Dictum of Viscount Simon in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, 601; 62 T.L.R. 466; [1946] 2 All E.R. 124 applied.

APPEAL against conviction and sentence.

The appellant raised the defence of provocation to a charge of malicious wounding. In the course of the trial the prosecution was allowed to cross-examine him as to his previous convictions, as the result of a question put by counsel for the appellant to the injured person. The appellant was convicted and appealed on the ground that leave to the prosecution to cross-examine as to previous convictions ought not to have been allowed, because if provocation was a proper defence to the charge the question put was itself proper because it was necessary to the foundation of the defence.

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R. H. Tucker for the appellant.
Malcolm Ward for the Crown.

The following cases were cited in argument: *Holmes* v. *Director of Public Prosecutions* [1]; *Reg.* v. *Cunningham.*[2]

LORD PARKER C.J. The appellant was convicted at the Worcester County Quarter Sessions of malicious wounding and he was sentenced to five years' imprisonment. He now appeals to this court against his conviction and his sentence.

The appellant was travelling on a bus with his dog and had a cane or a whip with him. As he moved to get off the bus he passed another passenger called Trueman, and according to the appellant, Trueman said: "Oh, you are getting off here Jack, "I thought you were coming to Droitwich with me." Thereupon the appellant made a most savage attack on Trueman, hitting him about the face and, as a result, he had a wound in the ear, abrasions on the hand and wrist and an injury to the left eye.

The defence put up at the trial was that that remark made by Trueman was intended as a suggestion that he, the appellant, should go with Trueman and commit some homosexual offence, and it was by reason of that that he was provoked, as he said, and attacked Trueman. In the course of the trial, Mr. Tucker, his counsel, in cross-examining Trueman said: "I must suggest "that by that remark you meant and he understood you to mean "that you were to go together and behave in a homosexual "manner? (A) Well, really that is fantastic, and I think that "it is incredible, because do you think," and thereupon the deputy chairman quite rightly interrupted and said: "Mr. Tucker, "do you realise where this is leading to?" Mr. Tucker persisted and went on a little later: "Did I have your answer to that "question? (A) I said that it would be incredible that I should "make any suggestion of any kind." Then the deputy chairman wrote down the answer: "I did not suggest that he should go to "Droitwich and behave in a homosexual manner." As the result of that, when the appellant went into the witness box the prosecution sought to cross-examine him as to his previous convictions and the deputy chairman allowed that to be done, with the result that four previous convictions for violence were brought out and were before the jury.

The appeal is based on the ground that leave to the prosecution to cross-examine the prisoner as to his previous convictions ought never to have been allowed. If provocation is a proper defence to a charge of this sort, then counsel must, so it is said, be allowed to put that question to the victim without having the prisoner's convictions brought out in court. It seems to the court that it is unnecessary to determine that question, though I think that, even

[1] [1946] A.C. 588 at p. 598; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[2] [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412.

if provocation was a proper defence, a question such as was put in this case must of necessity bring in the character of the prisoner, but in this case the court is clearly of opinion that in a case such as malicious wounding, there is no such thing as a defence of provocation. That defence only arises in a case of murder to reduce murder to manslaughter. That, it seems to us, is made clear by Viscount Simon in *Holmes* v. *Director of Public Prosecutions*.[1] It is true that he said[2]: "The whole doctrine "relating to provocation depends on the fact that it causes, or "may cause, a sudden and temporary loss of self control whereby "malice, which is the formation of an intention to kill or to "inflict grievous bodily harm, is negatived." There it seems to the court clear that Lord Simon was dealing and dealing only with a defence of provocation in a murder case. The matter is put perfectly clearly by him where, after referring to the fact that provocation may reduce murder to manslaughter, he goes on[3]: "In the case of lesser crimes, provocation does not alter "the nature of the offence at all: but it is allowed for in the "sentence."

Accordingly, in the judgment of this court the defence of provocation was not open to the appellant, and, therefore, there was no defence, and the fact that his convictions were before the jury could have made no difference.

There is yet another difficulty in the way of the appellant, namely, that, even if provocation could be a defence, there is no suggestion that words alone, except in a case under the Homicide Act, 1957, are sufficient to found a defence of provocation. For these reasons the appeal against conviction is dismissed.

As regards the appeal against sentence, it is true that the prisoner was given the maximum sentence, but having regard to his record of violence, there was no surprise in that. Both appeals accordingly are dismissed.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Thomas Horton & Sons, Bromsgrove.*

J. D. P.

[1] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

[2] [1946] A.C. 588, 598.

[3] Ibid. 601.

[CHANCERY DIVISION.]

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CHURCHER AND ANOTHER *v.* STREET AND ANOTHER.

[1956 C. 2869.]

Husband and Wife—Property—Matrimonial home—Desertion by husband—Occupation of home by wife—Sale of home by husband to mistress—Mortgage by mistress to trustees with knowledge of circumstances—Mortgage interest unpaid—Claim for possession—Rights of innocent beneficiaries of mortgagees—Exercise of court's discretion to grant possession—Circumstances under which exercisable—Applicable terms of exercise.

In 1942 a husband deserted his wife, the second defendant, leaving her in the matrimonial home, and went to live with his mistress, the first defendant. The house was owned by the husband and was subject to a building society mortgage. The husband wished to sell the matrimonial home, and in 1950 he bought another house for the wife to live in; she, however, refused to move at the last moment. The purchase money for this other house was trust money, borrowed from trustees who were the predecessors in title of the plaintiffs. At the same time further money was borrowed to cover the cost of repairs to the other house and to repay the mortgage on the matrimonial home. As security for these loans the husband executed a legal charge on the matrimonial home and the other house in favour of the trustees.

In 1951, following the decision in *Thompson* v. *Earthy* [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235, an arrangement was come to with the approval of counsel whereby the husband conveyed the matrimonial home to the mistress, who, it was thought, could take the property free of the wife's rights. To effect this arrangement the mistress borrowed money from the trustees and this money was then used to discharge the previous legal charge executed by the husband. The mistress then executed a new legal charge in favour of the trustees, the husband joining in the transaction. In 1952 the mistress commenced proceedings against the wife for possession of the matrimonial home. This action was dismissed (*Street* v. *Denham* [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532). One of the trustees was a partner in the firm of solicitors acting for the husband and the mistress. The wife was of limited means, her total weekly income amounting to £2 12s. 6d. including £2 paid by her husband under a maintenance order; the mortgage interest was in arrear since 1954, and the matrimonial home was falling into disrepair; the plaintiffs, as the present trustees, desiring to realize their security, sought possession of the house:—

Held, (1) that the discretion of the court to grant possession in such a case was unlimited, but was to be exercised judicially after taking into account all the relevant circumstances.

(2) That having regard to the conduct of the parties and especially to the fact that the wife was living in the house at the expense of the trustees' beneficiaries, who were entirely innocent, an order for possession at the end of six months would be made, with liberty to the wife to apply to the court if she paid the

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[Reported by Miss MARGARET THOMAS, Barrister-at-Law.]

mortgage interest and arrears, kept the property in repair, and executed a deed of covenant with the mortgagees to that effect.

Observations of Denning L.J. in *Jess B. Woodcock & Sons Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152, 156–157; [1955] 1 All E.R. 445 applied.

ADJOURNED SUMMONS.

The plaintiffs, Russell Emanuel Churcher and Kenneth Grainger Streeter, were the trustees of the will of the late William Emanuel Churcher and were seeking possession of the freehold premises known as 58, St. Michael's Grove, Fareham. This house had been purchased in 1937 by Peter Denham (hereinafter referred to as "the husband") on a building society mortgage, and it became the matrimonial home of himself and his wife, Elizabeth Denham, the second defendant. In 1943 the husband was found to have deserted his wife, and he was living with the first defendant, Dorothy Street, who was his mistress. At the date of the present hearing the wife was in receipt of the weekly income of £2 12s. 6d., of which £2 was paid by the husband under a maintenance order.

In 1949 the husband began to look for alternative accommodation for his wife as he wished to sell the house with vacant possession. In September, 1950, he found a leasehold house, 39, Henrietta Street, Portsmouth, and his wife agreed to move in if certain alterations were made. Relying upon this the husband contracted to purchase the house for £470. The lease was subject to a declaratory order under section 1 of the Town and Country Planning Act, 1946, and the wife was informed of this. The husband did some of the alterations at a cost to himself of £103, but he was unable to do the structural repairs until after completion. On the morning of the day fixed for her to move in, October 25, 1950, the wife consulted her solicitors and refused to move in. The husband was bound to complete the purchase and the house was conveyed to him on December 22, 1950. The wife still refused to give up possession of 58, St. Michael's Grove.

The money for the purchase of 39, Henrietta Street and the alterations was obtained by an advance from the then trustees of the will of W. E. Churcher. Part of the sum was used to pay off the balance owing on the building society mortgage on 58, St. Michael's Grove. The loan was secured by a legal charge on both properties made between the husband and the trustees and dated December 22, 1950. One of the trustees at that time was a solicitor who was in partnership with the first plaintiff, R. E. Churcher, and the partnership acted as solicitors for the husband and his mistress. That trustee, therefore, knew, when the charge was taken, that the husband was in desertion and that the wife was in occupation of the matrimonial home. This took place before the decision of the Court of Appeal in *Bendall* v. *McWhirter*[1] and the trustees thought that they would have no

[1] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

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difficulty in obtaining possession if default were made under the mortgage deed.

The husband continued to try to persuade the wife to go and live at 39, Henrietta Street, but as she refused to go, he and his mistress went there to live and remained until 1954, when he bought another house. From 1950 the wife lived alone in the matrimonial home, which had three bedrooms, and she never earned any money.

In 1951, following the decision of Roxburgh J. in *Thompson* v. *Earthy*,[2] an arrangement was come to with the approbation of counsel, under which the husband conveyed 58, St. Michael's Grove to his mistress for £1,500. £950 of this was raised by the mistress by an advance from the same trustees and the charge of December 22, 1950, was paid off. The advance of £950 was secured by a legal charge dated January 14, 1952, made between the mistress, the husband and the trustees, whereby the mistress charged 58, St. Michael's Grove by way of legal mortgage with the payment of the principal sum with interest, and the husband joined as surety and charged 39, Henrietta Street as collateral security. It was under this charge that possession of 58, St Michael's Grove was sought. The whole of the advance of £950 was made by the trustees out of moneys subject to the trusts of W. E. Churcher's will. £550, the balance of the purchase money, was raised by a loan from the husband secured by a legal charge dated January 15, 1952, and made between the mistress and the husband whereby the mistress charged 58, St. Michael's Grove by way of legal mortgage, subject to the charge of January 14, 1952, with the payment to the husband of £550 with interest. By concurring in the arrangement the trustees obtained the covenant of the mistress. His Lordship found that there was nothing sinister in the scheme so far as the trustees were concerned; they were acting for clients whose interests, although not conflicting, were not identical. On April 1, 1952, the mistress commenced proceedings against the wife in the Queen's Bench Division (*Street* v. *Denham*[3]) claiming possession of 58, St. Michael's Grove. The action, which was defended, was tried by Lynskey J., who dismissed it.

In April, 1954, the husband sold 39, Henrietta Street for £500 and reduced the mortgage debt under the charge of January 14, 1952, from £950 to £750, its present amount.

The original solicitor trustee died on December 10, 1954, and was succeeded as trustee by the first plaintiff. The second plaintiff, Streeter, had become a trustee in April, 1952, on the death of a previous trustee. The mortgage interest was in arrear from March, 1954. In the last few years the wife had spent £11 in repairs to 58, St. Michael's Grove and the house was falling into disrepair. Neither the husband nor the mistress was of any financial standing. The trustees therefore asked the court for an order of possession under Ord. 55, r. 5A.

[2] [1951] 2 K.B. 596. [3] [1954] 1 W.L.R. 624.

J. A. Plowman Q.C. and *D. Gidley Scott* for the plaintiffs.

R. L. Edwards Q.C. and *I. N. D. Wallace* for the second defendant.

The first defendant did not appear and was not represented.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Westminster Bank* v. *Lee* [4]; *Stewart* v. *Stewart* [5]; *Hutchinson* v. *Hutchinson.* [6]

ROXBURGH J. stated the facts and continued: Counsel for the plaintiffs conceded that in this court, and in this court only, the deserted wife has in respect of the matrimonial home an equity which is valid against a purchaser for value of the matrimonial home who has knowledge that she is a deserted wife, and also that the wife was such a person, and that the plaintiffs had that knowledge. That being so, it is agreed that the question whether the plaintiffs get possession depends upon the exercise by me of a judicial discretion, and the only matter of law which I have to deal with is whether there are any ambits to that judicial discretion, and, if so, what they are.

The last word on that subject so far has been said in *Jess B. Woodcock & Sons Ltd.* v. *Hobbs*,[1] in the Court of Appeal (Denning, Birkett and Parker L.JJ.), where the facts were as follows: A deserted wife remained in the matrimonial home, her husband paying the rent. The house was situated at the entrance to a yard where the husband carried on a road haulage business. Later the husband bought the premises and still permitted the wife to remain in occupation. When the road haulage industry was nationalized and the British Transport Commission compulsorily acquired the husband's business, he, through his solicitors, informed the commission that the wife was acting as a caretaker of the business and as such was living in the house rent-free. His purpose was to avoid paying the rent. When, some four years later, on the denationalization of the industry, the commission sold what had been the husband's business to the plaintiffs, it passed on the same information to the purchasers as to the position of the wife. She was in fact not acting as caretaker, having no duties to perform. Shortly after the conveyance had been completed the plaintiffs gave the wife notice to quit, and when she claimed to remain as a deserted wife they brought proceedings for possession. It was held first (by Denning and Birkett L.JJ.), that the plaintiffs were bona fide purchasers of the premises for value but with notice that the wife was in occupation and, in the circumstances, with constructive notice of her equity to remain in occupation, and, accordingly, the plaintiffs' purchase was subject to the wife's equity to remain in

[4] [1956] Ch. 7; [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883.

[5] [1948] 1 K.B. 507; 64 T.L.R. 115; [1947] 2 All E.R. 813.

[6] (1947) 63 T.L.R. 645; [1947] 2 All E.R. 792.

[1] [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445.

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occupation; but secondly (by the whole court) the wife's equity was a right to continue in occupation for so long only as the court in its discretion thought to be reasonable and, in the circumstances, she would be ordered to give up possession at the expiration of three months.

It is to be observed that in that case the plaintiffs had constructive notice only and not knowledge. I think it is fair to say that that was itself one of the circumstances which was taken into consideration, but I do not understand it to be suggested that because the plaintiffs here had knowledge and not merely constructive notice they are not entitled to invoke the theory that it is for the court to exercise its discretion. I do not think that has been argued, but I do not deny that it was one of the factors which was taken into consideration in this case.

Having considered the facts, Denning L.J. says [2]: "The "deserted wife has no right to stay indefinitely in the house. Her "right is only to stay until such time as the court in its dis-"cretion orders her to go out. That is the only right she has "against her husband, and it is the only right she has against his "successors. The court always has a discretion in the matter." The Lord Justice proceeds a little lower down [3]: "When the "purchaser, as here, brings an action for possession and the wife "sets up a claim to stay as a deserted wife, the court can, if it "thinks fit, make an order for her to go. The exercise of this "discretion is no doubt an anxious task, but a similar discretion "is exercised in the case of statutory tenants under the Rent "Acts, and in applications under the Bankruptcy Act, 1914 "(*Bendall* v. *McWhirter* [4]) and under the Law of Property Act, "1925 (*Bull* v. *Bull* [5])." He then gives some illustrations, but I do not read those as being definitions of any test which is to be applied, but merely as illustrations of what the court might be expected to do if the circumstances corresponded with the illustrations given, and the circumstances in this case do not, in my view, correspond with any of the illustrations given. But I notice some of the things which the Lord Justice took into consideration, and I will read them [6]: "The purchasers bought in "good faith at a fair value and they did not know she was a "deserted wife. They were told she was a caretaker. She had "been many years in the house paying no rent. When she was "offered a tenancy at 21s. 2d. a week, she did not accept it. If "she had only accepted it, she could have been a statutory tenant "with a status of irremovability, . . . but she has not at any time "offered to pay any rent. She sought in these proceedings to set "up the Statute of Limitations and claim a squatter's title. "True it is that she left everything to her husband. She "thought it was his duty to provide a roof over her head. It was

[2] [1955] 1 W.L.R. 152, 156.

[3] Ibid. 157.

[4] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[5] [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.

[6] [1955] 1 W.L.R. 152, 157.

"he who set up the story of a caretaker so as to save himself "paying rent. But, innocent as she is, she cannot be left there "much longer without paying rent. I think we should make an "order for her to give up possession in three months. That will "give her time to apply to the courts for further maintenance "from her husband to make up for the loss of her home."

Birkett L.J. said that he was of the same opinion. He said [7]: "I agree with what my Lord has said, that it is open to this "court to deal with this matter of discretion, and it does deal "with it today. I do not suppose that all the facts of this case "will ever be fully ascertained, . . . I think that enough is known "for this court to exercise its discretion. It is plain that the "deserted wife cannot claim to have a perennial tenancy whereby "she can stay there and never be removed in any circumstances."

Parker L.J. took a somewhat different view. He said [8]: "I agree with the proposed order. I would only add this. At "one time it looked as if we should have to decide, there being "no decision of this court as yet on the matter, whether the "protection afforded to a deserted wife in *Bendall* v. *McWhirter* [9] "could be extended to a case where the property in which the "wife continued to reside had been purchased by a purchaser "for value with constructive notice of the wife's possession. "Speaking for myself, I should on that matter have required "considerable further argument, since, as at present advised, "I see great difficulty in extending the wife's protection so as to "give her any rights against a bona fide purchaser, whether "with or without notice."

I want next to deal with the part played by the plaintiffs' predecessors in title, the trustees of the will in 1952, because that has been the subject of acute attack by Mr. Edwards, not without some support from authority, and I must deal with it fully.

If, when I decided *Thompson* v. *Earthy*,[10] I had thought of the possibility of some such transaction as was carried out in this case as between the husband and the deserted wife, I should have given further reflection to the case, and I can well understand that if the courts had not intervened to prevent those kinds of transactions, Parliament would have intervened. It would have been an advantage, in my view, if Parliament, rather than a higher court, had intervened, because, in order to prevent certain cases of injustice to deserted wives, a position has been brought about which may produce considerable injustice to other people unless each case is brought before the courts, which is a course involving considerable expenditure. That is very relevant, because, in explaining why he took the view that a wife's equity, as it is now commonly called, to the matrimonial home affected a purchaser for value, Denning L.J. said in *Bendall* v. *McWhirter* [11]: "It has been suggested that the husband's right

[7] [1955] 1 W.L.R. 152, 159.
[8] Ibid.
[9] [1952] 2 Q.B. 466.
[10] [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.
[11] [1952] 2 Q.B. 466, 483.

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"to apply under section 17 [of the Married Women's Property "Act, 1882] for possession is personal to the husband and does "not extend to his successor. Hence it is said that the successor "must be able to sue at law for possession because it is incon-"ceivable that he should have no means of getting her out. That "was the argument which prevailed with Roxburgh J. in "*Thompson* v. *Earthy* [12] and with the county court judge in the "present case. It seems to me, however, that one answer to "it may be this: Although an application under section 17 has "to be made in the husband's name, nevertheless a successor in "title can compel the husband to allow his name to be used "for the purpose. If the husband sells the house, there is an "implied assignment by the husband of his right to obtain posses-"sion; and equity has always compelled an assignor to allow an "action to be brought in his name. So if the husband becomes "bankrupt, the trustee can compel the husband to allow his "name to be used for an application under section 17: see "sections 22 (3) and 38 (*b*) of the Bankruptcy Act, 1914. Alter-"natively, the trustee in bankruptcy can make an application "under section 105 [of the Bankruptcy Act, 1914] for an order "that the wife do give up possession. In either case the court "which deals with the application is enabled under the relevant "section to do whatever is just. I must say, however that even "if a successor cannot compel the husband to apply under "section 17, but has himself to bring an action at law, neverthe-"less I should have thought the court would have a discretion "whether to order possession or not, for that is the only way in "which effect can be given to the wife's right as now established."

That last sentence is a critical one. It is obvious that the discretion under section 17 of the Married Women's Property Act, 1882, is not one of which, for example, the plaintiffs in the present case could have availed themselves. The discretion conferred by that Act is a statutory discretion. This discretion that I am now exercising appears to have had its birth in that sentence: "I should have thought the court would have a dis-"cretion whether to order possession or not, for that is the only "way in which effect can be given to the wife's right as now "established." Then it goes on [13]: "Any other view would lead "to great injustice." I think, therefore, it is a discretion which the court, or at least which Denning L.J. found, to spring ex necessitate rei, and in justification for it he added these very material words: "Any other view would lead to great injustice. "It would mean that a guilty husband could transfer the house "into the name of his new mistress and then get her to evict "his innocent lawful wife from the matrimonial home. No "civilised community could tolerate such a cynical disregard of "the married state. Equity demands that the successor in title "should be in no better position than the husband." "Well," says Mr. Edwards with great force, "what about this case: is

[12] [1951] 2 K.B. 596.

[13] [1952] 2 Q.B. 466, 484.

"not this just such a case as the one of which Denning L.J. "has said, 'No civilised community could tolerate'?." "Such "a cynical disregard of the married state" is what he is talking about, and we are not in this case concerned with the married state at all, but with the question as to whether or not somebody has lent some money, and as to whether he should or should not recover it by pre-existing rules of law. That is the first thing. Secondly, in this case, unlike the illustration which Denning L.J. gave, the husband did behave very reasonably in regard to his wife's accommodation before this transaction took place, and that is, I think, a factor of considerable importance. Thirdly, whatever may be thought about the transaction when regarded as one between the husband and his deserted wife—and I must confess that I think that in that regard the most offensive part of it was the selling to the mistress, rather than to any other person—the trustees, who lent money because they were trustees, have not acted wrongly. They only gave the transaction their support to the extent of permitting what they thought was a good mortgage to be changed into what they thought was an equally good mortgage, neither better nor worse, for I disregard the mistress's covenant. They did it with the knowledge that the transaction had been submitted to counsel with a query as to its propriety, and counsel had expressed himself as satisfied. They stood in no circumstances to gain anything out of it except, to my mind, the unimportant benefit of the additional security of the mistress's covenant. Could any court on those materials find the trustees guilty of a breach of trust?

The trustees acted in part on the advice of the trust solicitors, but more important, as that was the firm of which one of the trustees was a member, they acted here on the approbation of counsel. I think it was a little strong to say it was on the advice of counsel, but counsel certainly advised them that it was a safe thing to do. I cannot visualise that the trustees would be held to have committed a breach of trust in those circumstances, and, if not, who is going to suffer from this transaction? The solicitors who devised the scheme subject to counsel's approval should not suffer, but the beneficiaries of this trust, who had nothing whatever to do with either the matrimonial dispute or this transaction except their concurrence in what their trustees did in the manner which I have indicated, have suffered. Moreover, I think that Denning L.J. spoke perhaps more strongly than he intended in that passage in *Bendall* v. *McWhirter*,[14] because, while I do not suggest that the underlying reasoning is unsound, namely, that Parliament would almost certainly have intervened if the courts had not done so to prevent such a transaction as the Lord Justice was visualizing, I have always thought that it was not unprofessional to take such advantage of loopholes in the law as existed from time to time. I find it very difficult to condemn any solicitor

[14] [1952] 2 Q.B. 466, 484.

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who, thinking he saw a way out of what was, I think, an unjust situation, namely, that the wife was staying in this house and refusing to accept alternative accommodation and paying nothing for it, took this way out of it. It does not seem to me that it was an improper thing for him to advise his client to try and get out of it in that way. We know the attempt failed, but the whole state of the law on this subject is not clear yet. It was very obscure then, and I think the fairer approach to this transaction is to be found in a passage in Denning L.J.'s judgment in the *Woodcock & Sons Ltd.* case, where after referring to *Street* v. *Denham*,[15] *Ferris* v. *Weaven*[16] and an unreported case on the same subject he said[17]: "Counsel for the "plaintiff company said that those three cases were to be "explained as cases of collusion; but they were not put on that "ground, and I do not think it is the correct explanation. The "conveyances were real enough. They were not shams. They "were intended, it is true, as a means of getting round the law; "but that is not itself a ground for denying their validity. I "may instance the transaction by which hire-purchase finance "companies do business. All those transactions are a means of "getting round the law about bills of sale; but so long as there "is a real purchase by the finance company and a real hiring "back, the transactions are good. The true explanation of the "three cases is, I think, the ground taken by the judges, namely, "that the mistress and the purchasers respectively took with full "knowledge of the facts. They were therefore in no better "position than the husband and took subject to the wife's right "to stay in the house. The husband, it is true, had an ulterior "motive. He wanted the wife turned out of the house, but that "does not affect the legal position. It would be the same if the "husband had given the house to his mistress or to his brother-"in-law"—and I stress that, because I think the brother-in-law is much less offensive than the mistress—"by a deed of gift. If "they took with full knowledge of the facts they ought not to be "able to turn out the wife any more than the husband could. "This means, no doubt, that the wife's right is an equity." That is language much less severe and much less flavoured with a moral reproach than is the language of the passage on which Mr. Edwards relies, and I am much more inclined to Denning L.J.'s later statement. I think Parker L.J.'s judgment on that point should not be overlooked. Having said what I have already read, he continued[18]: "I do not, however, in any way suggest "that *Street* v. *Denham*[19] and *Ferris* v. *Weaven*,[20] to which my "Lord has referred, were wrongly decided, since they could in "any event be justified on their special facts. In both those "cases the purchases were not made by purchasers treating at

[15] [1954] 1 W.L.R. 624; [1954] 1 All E.R. 532.
[16] [1952] 2 All E.R. 233.
[17] [1955] 1 W.L.R. 152, 155.
[18] Ibid. 160.
[19] [1954] 1 W.L.R. 624.
[20] [1952] 2 All E.R. 233.

"arms' length, but they were purchases made at the instigation "of the husband and so as to enable him to get a benefit there-"from; in other words, the transaction in each case was a device "to get the wife out for the husband's benefit."

Therefore, too much weight should not be attached in this case to the circumstances that the trustees did concur in a transaction which might have been done with less offence at the time, and which now, in the light of later developments, would not be attempted at all. But I have taken that into consideration and it will affect, to some degree, the way in which I propose to exercise my discretion.

I do not think that there are any limitations upon this recently judge-made discretion, except the limitation which applies to all exercises of judicial discretion, that is to say, that it must be exercised judicially, or in the light of judicial common sense. If the discretion exists at all, it seems to me that all the relevant circumstances should be taken into consideration.

I come next to deal with the other side of the picture. First, whatever may be said about these various rights, whether they are equities or irremovabilities, or whatever else they might be, two facts in this case stand out. The first is that the trustees were in no way involved in the matrimonial dispute, and the law of marriage of this country has suffered no cynical disregard by them, or disregard at all. The second fact is that, without any arrière-pensée, they lent £950 entirely as a matter of business, that is to say, as an investment as trustees, and they had no purpose of facilitating either the wife's or the husband's fortunes; they just wanted an investment for their money and the husband had the money; the mistress had no money, and if they have done anything amiss, it is merely that they gave up the better security for one not quite as good, because it would have been much better to have had the husband's security without the mistress's covenant than to have had her security and her covenant.

Why, because the husband deserted his wife 16 years ago, should the deserted wife be living in this house, not at the expense of the husband, but at the expense of the trustees' beneficiaries? In that connexion I stressed a passage in Denning L.J.'s judgment: perhaps it would be fairer to see whether the husband's conduct could not be compensated for more equitably by an increase in maintenance than by depriving the beneficiaries of the income on the money which they have lent. If I did not grant any relief in this case, it seems to me certain that this wife who has earned nothing in the last 16 years, does not appear to be working, and is extremely poor, would be able to live rent and interest free in this house for the rest of her days at the expense of the beneficiaries. That cannot possibly be right, on any view of this case. It is all very

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well to say: "Why do not the trustees sue the mistress? Why "do not they sue the husband?" I do not think it would be a very profitable transaction for the trustees even if they got a judgment against the mistress because it would probably never be satisfied. These trustees would never have advanced money if they had not thought they had a security in this property; they never lent this money on the security of the husband or the mistress; they lent it on the security of the property. It seems to me something very strong would be needed to produce such an inequitable result as to deprive the beneficiaries of income because of this dispute between the husband and the wife, however right the wife may be in the matrimonial dispute. Where people who have lent money are concerned, a deserted wife must sooner or later try and mitigate the damage which she has suffered in the practical sphere. I cannot refuse the trustees relief.

On the other hand, I appreciate the great difficulties in which the wife may be. Housing accommodation is extremely difficult to get, and I cannot imagine that any local authority would look with much favour on a woman who was living in a house with three bedrooms, and who was not doing anything in the way of taking in lodgers. It seems to me possible for her to bring about a position in which she might continue to live in this house and the beneficiaries might have their 4 per cent. interest and their security preserved. That would postpone their chances of realization, but that would not matter much so long as the security were kept up. It would also mean they could not get a greater rate of interest than 4 per cent., which no doubt they could if they called it in, but I think that disadvantage is the price that the plaintiffs should pay.

Therefore, what I propose to do is to make an order for possession six calendar months from today. My view is that if the wife wants to stay in this house after that date, she must make satisfactory proposals to the plaintiffs. I shall give an outline of what I should regard as satisfactory.

Although, strictly speaking, the wife cannot charge the premises because she has no title that is capable of being charged, she should execute a document which bears a close family resemblance to a mortgage, by which on no ground could she stay, except by consent, after divorce, or the death of the husband, or make an assignment to take effect after her death. I think it would not be fair to require her to covenant to repay the principal; but it would be fair to make her covenant to pay the interest and to keep the property in the same state of repair as is required by the subsisting mortgage deed. It may be that if that clause is not sufficiently stringent, a more stringent clause is warranted, having regard to the fact that the mortgage cannot be called in for

merely not repaying the capital. That is a matter for investigation. I also think that she must pay the arrears of interest which have accrued during her period of occupation.

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Judgment against the first defendant. Order for possession against the second defendant at the end of six months, with liberty to apply to the court within five months.

Solicitors: *Sinclair, Roche & Temperley for Churcher & Churcher, Gosport; Gibson & Weldon for Hobson, Thomas, Sherwell & Wells, Portsmouth.*

[COURT OF APPEAL.]

MIDLAND BANK EXECUTOR AND TRUSTEE CO. LTD. *v.* INLAND REVENUE COMMISSIONERS.

C. A.

1958 *Nov.* 5; *Dec.* 18.

Jenkins, Romer and Willmer L.JJ.

[1937 M. No. 257.]

Revenue—Estate duty—Property passing on death—Property chargeable—Derivative trust—Gift of income of trust fund to beneficiaries of "A" trust for 21 *years subject to discretionary power of accumulation—Gift over to persons to be appointed under "B" trust—Rights of "A" beneficiaries relinquished by deed and court order in favour of "B" beneficiaries subject to similar power—Appointment of "B" beneficiary to interest in income of trust fund—Death of beneficiary before expiration of* 21 *years—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*).

A testator who died on July 20, 1937, by the codicil to his will dated June 19, 1935, bequeathed certain shares, called "the "retained shares," to his trustees upon trust that they should "until the expiration of a period of 21 years from my death or until "my daughter Jeannette W. shall die whichever shall first happen "apply the income of the retained shares" in making certain grants to certain shipping companies mentioned in his will, "and "at the expiration of such period or at the death of my said "daughter whichever shall first happen my trustees shall hold the "retained shares upon trust if my said daughter shall die before "the expiration of the said period of 21 years to accumulate the "income thereof until the expiration of the said period of 21 "years . . . and from and after the expiration of such period of "21 years my trustees shall hold two fifths of the income of the "retained shares and such accumulations aforesaid if any upon "protective trusts as declared by section 33 of the Trustee Act, 1925, "for the benefit of Anne H. wife of my nephew Francis H. for the "period of her life Subject thereto my trustees shall during the "lives of my said nephew and his said wife and the survivor of "them apply the residue of the income of the retained shares and "such accumulations as aforesaid if any for the benefit of such "child or children of my nephew and his said wife as shall for the

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"time being be living and if more than one in such manner and in "such shares as during the life of my nephew and his said wife "[they] shall jointly and during the life of the survivor of [them] "the survivor of them shall in writing from time to time direct."

The testator further directed that from and after the death of the survivor of the nephew and wife the trustees should hold the retained shares and any accumulations in trust for such of their children or remoter issue as they or the survivor of them should appoint, with a trust in default of appointment for their children who should attain 21 or being daughters marry under that age.

The testator was survived by all the named persons. Jeannette W. survived the 21-year period, so that the trust for accumulation never took effect. Francis H. died in December, 1957; his wife and two daughters, who had attained 21, were still living. A son, Geoffrey H., whose death was the occasion of the present summons, died on October 7, 1955, having attained 21.

On October 25, 1941, pursuant to an agreement and an order of the court (which provided that on the existing equitable interests during the 21-year period being assured to the trustees they might be authorized to deal with the income arising during that period, whether or not Jeannette W. was alive, on the footing applicable after that period), a deed was made to vary the trusts of the codicil by the shipping companies, Jeannette W. (who was interested in certain events in income which might arise from the retained shares) and the testator's trustees. This provided that "each of "the shipping companies and Mrs. W. according to their respective "rights and interests hereby declare that as from the date of the "testator's death the income of the [retained shares] shall until "the expiration of the period of 21 years from the testator's death "or the death of Mrs. W. whichever shall first happen be held upon "the same trusts as are by the said codicil declared in respect of "the income of the said shares after the expiration of 21 years from "the death of the testator."

The nephew and his wife made the following directions in writing: (a) on February 22, 1954, directing payment of the three-fifths share of the income to their three children in equal shares; (b) on April 27, 1955, directing that the share of Geoffrey H. should be paid to a certain company for his benefit; (c) on April 9, 1956, after the death of Geoffrey, that the three-fifths share should be paid to the two daughters equally.

The Revenue claimed that the death of Geoffrey brought about a passing of a one-fifth share in the capital of the trust fund under section 1 of the Finance Act, 1894 [1] (as was held by Danckwerts J.), or that the deceased had an interest ceasing at his death on such proportion under section 2 (1) (*b*).

On appeal:—

Held, allowing the appeal, (1) that under the terms of the order of the court and the deed of 1941 there was no acceleration of Geoffrey's interest in the income of the retained shares due to take effect under the codicil after the 21-year period, as, in the event of the prior death of Jeannette W., the trustees still had a discretion to accumulate income, if they thought fit.

[1] Finance Act, 1894, s. 1: "In "the case of every person dying after "the commencement of this Part of "this Act, there shall . . . be levied "and paid, upon the principal value ". . . of all property, real or per-"sonal, settled or not settled, which "passes on the death of such person "a duty, called 'estate duty' . . ."

S. 2: "(1) Property passing on "the death of the deceased shall be "deemed to include . . . (*b*) Property "in which the deceased or any other "person had an interest ceasing on "the death of the deceased, to the "extent to which a benefit accrues "or arises by the cesser of such "interest; . . ."

(2) That the interest of Geoffrey which passed on his death was derived not from the codicil but from the order of the court and the deed of 1941.

(3) That such interest, on which estate duty became payable under section 1 of the Act of 1894, was the principal value, actuarially ascertained as at the date of his death, of a one-fifth share of the income of the retained shares during the remainder of the 21-year period or until the death of Jeannette W., if earlier, together with the value (if any) attributable at the date of his death to a one-fifth share of any income which in the event of the death of Jeannette W. before the expiration of the 21-year period the trustees might think fit to distribute under the authority of the court order in lieu of accumulating it.

Attorney-General v. *Milne* [1914] A.C. 765 and *Christie* v. *The Lord Advocate* [1936] A.C. 569; [1936] 1 All E.R. 443 considered.

APPEAL from Danckwerts J.

The facts are taken substantially from the judgment of Jenkins L.J.

This was an appeal by the present trustees of the will and codicil dated respectively June 4 and 19, 1935, of Charles Willis Harrison (hereinafter called "the testator"), who died on July 20, 1937, from an order of Danckwerts J. dated February 26, 1958, whereby it was declared that in the events which had happened estate duty became payable under section 1 of the Finance Act, 1894, on the death of Geoffrey Ainsworth Harrison (hereinafter called "the deceased") in respect of a one equal fifth share of the capital of the "retained shares" referred to in the said codicil.

It is unnecessary to refer to any of the provisions of the testator's will. By the codicil thereto the testator (by clause 1) bequeathed to his trustees 10,000 of the ordinary shares held by him in Harrison Trust Ltd. and 10,000 of the ordinary shares held by him in the Atherton Investment Corporation Ltd. and directed that his trustees should hold such shares thereinafter called "the retained shares" upon the trusts thereinafter declared concerning the same.

By clause 2 of the codicil the testator declared the following trusts concerning the retained shares: "My trustees shall until "the expiration of a period of twenty one years from my death "or until my daughter Jeannette Adeline Wightman-Harrison "shall die whichever shall first happen apply the income of the "retained shares in making such grants to the shipping companies "mentioned in clause 5 of my said will or to any two or more "of them as for a period of twenty one years from my death my "trustees are directed to make under clause 6 of my said will and "upon the undertaking in that clause mentioned, and at the "expiration of such period or at the death of my said daughter "whichever shall first happen my trustees shall hold the retained "shares upon trust if my said daughter shall die before the "expiration of the said period of twenty one years to accumulate "the income thereof until the expiration of the said period by

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"investing the same and the resulting income from such investments in any mode of investment authorized by my said will and from and after the expiration of such period of twenty one years my trustees shall hold two fifths of the income of the retained shares and such accumulations aforesaid if any upon protective trusts as declared by section 33 of the Trustee Act, 1925, for the benefit of Anne Harrison wife of my nephew Francis Joseph Harrison for the period of her life. Subject thereto my trustees shall during the lives of my said nephew Francis Joseph Harrison and his said wife and the survivor of them apply the residue of the income of the retained shares and such accumulations as aforesaid if any for the benefit of such child or children of my said nephew and his said wife as shall for the time being be living and if more than one in such manner and in such shares as during the life of my said nephew and his said wife my said nephew and his said wife shall jointly and during the life of the survivor of my said nephew and his said wife the survivor of them shall in writing from time to time direct."

By clause 3 of the codicil the testator directed that from and after the death of the survivor of his said nephew and his said wife his trustees should hold the retained shares and such accumulations if any in trust (to put it shortly) for the children or remoter issue of his said nephew and his said wife as they or the survivor of them should appoint with a trust in default of appointment for their children who should attain the age of 21 years or being daughters marry under that age.

The testator was survived by his daughter, Jeannette Adeline Wightman-Harrison (hereinafter called "the daughter"), by his nephew, Francis Joseph Harrison (hereinafter called "the nephew"), and by the nephew's wife, Anne Harrison (hereinafter called "the nephew's wife"). The nephew died on December 11, 1957. The nephew's wife was still living. They had two daughters who were still living and had attained the age of 21 years and one son, namely, the deceased, Geoffrey Ainsworth Harrison, who attained the age of 21 years and died on October 7, 1955, and on whose death the present claim to estate duty arose. The period of 21 years from the death of the testator expired on July 19, 1958, in the lifetime of the daughter, so that the trust under clause 2 of the codicil for accumulation of the income of the retained shares in the event of her dying before the expiration of such period in fact never became operative.

It will be seen that if the matter had been left to depend upon the codicil alone, there could have been no question of any liability to estate duty on the death of the deceased in respect of any share or interest in the retained shares, as on that footing his only interests would have been an interest in expectancy in the income of the retained shares under the trusts limited to take effect after the expiration of the period of 21 years from the testator's death, which by reason of the death of the deceased

would have failed or determined before it became an interest in possession (see Finance Act, 1894, section 5 (3)), and the possibility of an interest under the trusts in default of appointment contained in clause 3, which could only constitute property for estate duty purposes in the event of both his parents dying without fully appointing the fund.

But after the death of the testator an arrangement was carried out by means of the documents and order of the court, and the Commissioners of Inland Revenue claimed that what was then done had the effect either (a) of bringing about a passing on the death of the deceased under section 1 of the Finance Act, 1894, of a one-fifth share in the capital of the trust fund (the view which commended itself to Danckwerts J.); or alternatively (b) of conferring on the deceased an interest ceasing on his death in a like proportion of the trust fund under section 2 (1) (*b*), which having regard to section 7 (7) (*b*) would have the same result as the primary claim under section 1.

By an agreement dated July 15, 1940, the parties to which included amongst others the two companies named in clause 1 of the codicil, the four shipping companies named in clause 5 of the will, and the daughter, provision was made for the reconstruction of the two companies named in clause 1 of the codicil, which involved the exchange of the retained shares for shares in two new companies formed to take the place of the two companies named in clause 1 of the codicil: and it was a term of this agreement that a further agreement should be entered into.

By a further agreement, also dated July 15, 1940, and made between the four shipping companies of the one part and the daughter of the other part, it was agreed and declared as follows: "(1) Mrs. Wightman-Harrison and the shipping com-
" panies shall upon the reconstruction agreement becoming
" absolute execute an instrument in the form of the draft instru-
" ment annexed hereto marked VIII or in such other form as may
" be agreed between Mrs. Wightman-Harrison and the shipping
" companies and approved by the Chancery Division of the High
" Court of Justice. This agreement is conditional on: (a) An
" order being obtained from the Chancery Division of the High
" Court of Justice sanctioning the exchange provided for by the
" reconstruction agreement as respects the ten thousand shares
" in Harrison Trust Ltd. and the ten thousand shares in The
" Atherton Investment Corporation Ltd. specifically bequeathed
" by the codicil dated June 19, 1935, of Charles Willis Harrison
" and (b) The reconstruction agreement becoming absolute and
" (c) Unless Mrs. Wightman-Harrison and the shipping companies
" otherwise agree an order being obtained from the Chancery
" Division of the High Court of Justice providing in substance
" that the income of the said shares and of the investments for
" the time being representing the same accruing between the
" date of the death of Mrs. Wightman-Harrison and the expira-
" tion of twenty one years from the date of the death of the

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"testator shall be held upon the trusts which are applicable "under the said codicil of the testator to the same income after "the expiration of the said twenty one years."

A deed in the terms of the draft annexed to the last mentioned agreement was in fact executed by the four shipping companies, the daughter and the trustees on October 25, 1941.

By an order made by Simonds J. on November 1, 1940 (*In re Harrison, decd.*, 1940 H. No. 2453), approval was given to the acceptance and retention by the trustees of the will and codicil of the shares to be taken in exchange for the retained shares under the reconstruction agreement, and it was ordered (inter alia): "That (subject to the interests of the plaintiff Jeannette Adeline "Wightman-Harrison and the defendants The Willis Steamship "Company Ltd. National Steamship Company Ltd. The Gow-"land Steamship Company Ltd. and J. & C. Harrison Ltd. in the "income to arise from the said shares settled by the codicil and "the investments for the time being representing the same during "the period of 21 years from the date of the testator's death being "assured to the trustees of the said will) the plaintiffs as such "trustees may be authorized to deal with all income so arising "during the said period whether or not the plaintiff Jeannette "Adeline Wightman-Harrison be living on the footing applicable "under the said codicil to income to arise after the expiration "of the said period."

By a deed dated October 25, 1941, and made between the four shipping companies of the first part, the daughter of the second part and the trustees of the third part and expressed to be supplemental to the will and codicil, it was agreed and declared (so far as material for the present purpose) as follows: "(1) "Each of the shipping companies and Mrs. Wightman-Harrison "according to their respective rights and interests hereby declare "that as from the date of the testator's death the income of the "ten thousand shares in Harrison Trust Ltd. and the ten thou-"sand shares in The Atherton Investment Corporation Ltd. which "were bequeathed by the said codicil of the testator and the "investments for the time being representing the same shall "until the expiration of the period of twenty-one years from the "death of the testator or the death of Mrs. Wightman-Harrison "whichever shall first happen be held upon the same trusts as "are by the said codicil declared in respect of the income of the "said shares after the expiration of twenty-one years from the "death of the said testator."

It was not in dispute that the testator made no disposition of any income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter which might not be applied in making grants to the four shipping companies in accordance with clause 2 of the codicil, and accordingly that any such unapplied income would belong to the daughter as the only person

interested in any property as to which he died intestate. Accordingly the daughter and the four shipping companies were between them entitled to the whole of the income arising during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter, and were thus able to make the disposition of such income effected by the deed of October 25, 1941.

The position from and after October 25, 1941, therefore was that by virtue of the deed of that date the respective interests of the four shipping companies under clause 2 of the codicil and of the daughter under any intestacy in the income to arise from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter was as from the death of the testator held by the trustees as to two-fifths thereof upon protective trusts for the benefit of the nephew's wife during her life and as to the remaining three-fifths thereof in trust during the lives of the nephew and the nephew's wife and the survivor of them to apply the same for the benefit of such child or children of the nephew and the nephew's wife as should for the time being be living, and if more than one in such shares as the nephew and the nephew's wife or the survivor of them should in writing from time to time direct. It should be added that the deed of October 25, 1941, did not and could not touch the trust for accumulation during the residue of the 21-year period imposed by clause 2 of the codicil in the event of the daughter dying during that period, and that while the order of Simonds J. authorized the trustees to deal with all income arising during the 21-year period whether the daughter should be living or not on the footing applicable under the codicil to income arising after the expiration of such period, so that they could, if they chose, ignore the trust for accumulation, it did not oblige them to do so.

By a direction in writing dated February 22, 1954, the nephew and the nephew's wife directed that the three-fifths share of income of the retained shares should be paid to their three children in equal shares. By a further direction in writing dated April 27, 1955, the nephew and the nephew's wife directed that the share of income hitherto paid to the deceased should be paid to Messrs. T. Turketine & Co. Ltd. to be utilized by them for the benefit of the deceased. By a further direction in writing dated April 9, 1956, given in consequence of the death of the deceased on October 7, 1955, the nephew and the nephew's wife directed that as from that date the three-fifths share of the income of the retained shares should be paid to their two daughters in equal shares.

The Commissioners of Inland Revenue claimed that inasmuch as the second of the above mentioned directions was still in force at the time of the death of the deceased he was entitled in possession at the time of his death to one-fifth of the income of

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the retained shares and consequently that the corresponding proportion of the capital of the retained shares passed on his death under section 1, the fact that his interest in such income was liable to be terminated at any time by a further direction being immaterial, inasmuch as in the events which happened it was in fact terminated by his death.

John Pennycuick Q.C. and *K. J. T. Elphinstone* for the trustees.

E. Milner Holland Q.C. and *E. Blanshard Stamp* for the Crown.

Cases referred to in argument but not cited in the judgments: *Wallace* v. *Attorney-General*[2]; *In re Flower's Settlement Trusts.*[3]

Cur. adv. vult.

December 18. JENKINS L.J., after stating the facts, continued: On the part of the trustees, Mr. Pennycuick argued, albeit somewhat faintly, that the deceased was merely one of the objects of a discretionary trust whose death merely put an end to his chance of participating in the income to some unpredictable extent through the exercise of the discretion in his favour and enhanced the respective chances of the two daughters of so participating by reducing the number of objects of the discretion. If the trust could properly be regarded as a discretionary trust it appears to me that Mr. Pennycuick's argument on this part of the case would be unanswerable. But I agree with the judge that this is not a discretionary trust in any relevant sense. The nephew and the nephew's wife no doubt had a discretion as to the directions to be given from time to time but it appears to me that their power of giving directions was in the nature of power of appointment and that each direction given was in the nature of a revocable appointment under that power, conferring on each object of the direction (or in other words each appointee) a definite interest in the share of income assigned to him or her continuing until revoked by some subsequent direction or until the previous death of the appointee. Mr. Pennycuick did not dispute that if this view was right this branch of his argument could not be supported.

I therefore reject the contention that no estate duty at all became payable on the death of the deceased because he was merely an object of a discretionary trust.

It remains to consider the more difficult question in the case, which may be put in this way: Granted that *some* property passed on the death of the deceased within the meaning of section 1 of the Act, what was the property which then passed and upon which duty then became exigible?

[2] (1865) L.R. 1 Ch.App. 1.

[3] [1957] 1 W.L.R. 401; [1957] 1 All E.R. 462.

To this question the Commissioners of Inland Revenue propound the short and simple answer that inasmuch as the deceased was at the time of his death in receipt beneficially of one-fifth of the income of the retained shares under the direction then in force, and on his death that share of income ceased to be payable to him and became applicable for the benefit of his two sisters in such shares and manner as the nephew and the nephew's wife or the survivor of them should from time to time direct, the share of capital required to produce that income passed, that is to say changed hands, on his death, with the result that duty became payable on one-fifth of the corpus of the retained shares, the nature of the dispositions by which this actual passing of one-fifth of the capital was brought about being immaterial. It is also argued on the commissioners' side that the combined effect of the deed of October 25, 1941, and of the order of Simonds J. was to accelerate the interests in income limited by the codicil to take effect after the expiration of 21 years from the death of the testator and that the deceased should accordingly be regarded as having been at the time of his death beneficially entitled in possession to one-fifth of the income of the retained shares under the trusts of the codicil as so accelerated. Consideration of this branch of the commissioners' argument may conveniently be deferred until a later stage in this judgment.

On the other hand, it is urged on the part of the trustees that all that passed on the death of the deceased was the principal value, actuarially ascertained as at the date of his death, of a one-fifth share of the income of the retained shares for the period until the expiration of 21 years from the death of the testator or until the previous death of the daughter, to which there should, I think, be added the principal value (if any) attributable at the date of the death of the deceased of one-fifth of any income which in the event of the death of the daughter before the expiration of the 21-year period the trustees might think fit to distribute during the residue of that period under the authority conferred by the order of Simonds J. in lieu of accumulating it in accordance with the trusts of the codicil.

The principles relied on by the trustees in support of this submission, and their application to the present case, may be thus stated:

(1) Under section 1 of the Act duty is leviable "upon the "principal value ascertained as hereinafter provided of all "property . . . settled or not settled, which passes on the death" of every person dying after the commencement of Part I of the Act; and under section 22 (1) (*h*) of the Act "settled property" means property comprised in a settlement.

(2) In this case the claim is clearly concerned with a passing of settled property. In order to make good a claim to duty in respect of the passing on a death of settled property it is necessary (a) to identify the settlement comprising the property which or

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part of which is alleged to have passed; (b) to identify the property comprised in that settlement; and (c) to show that under the trusts of that settlement that property, or some part thereof, passed on the death in question.

(3) The relevant settlement in the present case must be either (i) the settlement constituted by the codicil or (ii) the settlement constituted by the deed of October 25, 1941, in conjunction with the order of November 1, 1940, or (iii) the settlement constituted by the combined effect of the codicil, the deed and the order.

(4) The property comprised in the settlement constituted by the codicil was clearly the fund of capital represented by the retained shares together with the income arising from that fund. But admittedly there was no dutiable passing of any part of that fund on the death of the deceased under the trusts of the settlement constituted by the codicil taken alone. It is therefore necessary to look further in order to make good the claim to duty.

(5) If the settlement constituted by the deed and the order is regarded as the relevant settlement, then the property comprised in that settlement, or in other words the property of which it disposed, was (quoad the deed) the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter, and also (quoad the order) in the event of her death before the expiration of such period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with in the manner authorized by the order in lieu of accumulating it in accordance with the trusts of the codicil.

(6) If the settlement constituted by the combined effect of the codicil, the deed and the order is regarded as the relevant settlement the same result follows. The only property disposed of by the joint effect of these instruments was (quoad the codicil and the deed) the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter and (quoad the order), in the event of her death during the 21-year period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with as aforesaid.

(7) The only part played by the codicil was to provide for the benefit of the four shipping companies (and to the extent of any intestacy) for the benefit of the daughter the limited interest in income subsequently disposed of by the deed, and to impose in the event of the daughter dying within the 21-year period the trust for accumulation during the residue of that period; and the only part played by the order was to authorize, not direct, the trustees, in that event, to apply the income arising during the residue of that period as if that period had in fact expired, in lieu of accumulating it as directed by the codicil. No trusts giving rise to any passing on the death of the deceased subsisted at his

death by virtue of any instrument other than the deed, and the only property on which the deed could operate, or on which it could impose trusts, was the interest of the disposing parties, viz., the interest of the four shipping companies and the daughter in the income arising from the retained shares during the period until the expiration of 21 years from the death of the testator or the previous death of the daughter.

The somewhat complicated and unusual nature of the trusts declared by the codicil, and the circumstance that the trusts declared by the deed are in favour of the same persons as those entitled under the trusts limited by the codicil to take effect after the expiration of the 21-year period, and are actually declared by reference to those trusts, tend to some extent to obscure the point at issue.

But it is in fact a question of considerable general importance, which so far as I can see enters into every case in which there has been a derivative disposition or settlement of a limited interest created by a previous settlement. I will attempt some examples.

A settles property on B for life with remainder to B's children. B assigns his life interest to C, who dies in the lifetime of B. On the death of C what duty is payable? On the trustees' view of the matter there would pass on the death of C, as part of his free estate, property consisting of the residue of B's life interest, the value of which would be actuarially ascertained as at the death of C, and no liability to duty on the corpus of the fund would arise until the death of B, the cesser of whose life interest would attract duty in the ordinary way. On the view contended for by the commissioners, as I understand it, the capital of the entire settled fund would pass on C's death and attract duty accordingly, on the ground that the whole of it then changed hands, besides which duty on the capital of the entire settled fund would become payable in the ordinary way on the death of B, by virtue of the cesser of his life interest under the settlement. It seems to me that this cannot be right.

As a further example, one may take the case of a settlement of property by A on B for life with remainder to B's children, followed by a settlement by B of his life interest on X for life with remainder to X's children. X dies in the lifetime of B. According to the trustees' contention the property passing on the death of X would be the property in which X's life interest subsisted, i.e., the life interest of B, and the passing on the death of X would be limited to that property the principal value of which would be actuarially ascertained as at the death of X. According to the commissioners' contention, duty would be exigible on the death of A on the capital of the entire settled fund as in the first example, besides being exigible in the ordinary way on the subsequent cesser of B's life interest. Again, it seems to me that this cannot be right.

As a third and final example, one may take the case of a settlement by the will of a testator A of his residuary estate in

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trust for X during the period of 21 years from A's death or until the previous death of Y, with a trust for accumulation from the death of Y until the expiration of the 21-year period in the event of Y dying before such expiration, followed by a life interest to Z with remainder as to capital and income in trust for Z's children at 21 or marriage. X executes a declaration of trust of his limited interest above described, under which that limited interest is to be held in trust for Z for life with remainder to Z's children as above. Z dies before the expiration of the 21-year period and in the lifetime of Y. In this simplified version of the present case the commissioners' contention involves the conclusion that on the death of Z there would be a passing not merely of the property comprised in the declaration of trust made in Z's favour by X, i.e., the income to arise from the residuary estate during the period until the expiration of 21 years from the death of the testator or the previous death of Y, which was all X had to dispose of, but of the capital of the entire residuary estate. Again, it seems to me that this cannot be right.

In all three examples, and in all comparable cases, it appears to me that the true position in fact and in law is that a limited interest conferred on a person by a settlement has been disposed of by the beneficiary as a distinct item of property in right of his or her beneficial interest in it, and that any subsidiary limited interests carved out of the limited interest disposed of are to be regarded as taking effect exclusively out of and to the extent of the limited interest disposed of and not otherwise. I see no sufficient reason for regarding them in any other way for estate duty purposes.

The commissioners' view would seem to produce somewhat remarkable results. For instance, it would mean that a life tenant could by an appropriate disposition of his life interest in a settled fund subject the capital of the fund, in which he had no interest whatever, to a claim for duty on the death of any person on whom he might choose to confer a life interest carved out of, and necessarily limited in its duration to the duration of, his own life interest. This seems to me absurd.

There is a remarkable dearth of authority on this question, which must have arisen time and again since 1894.

The authors and editors of three well-known works on death duties appear on the whole to favour the trustees' view (see Dymond, 12th ed., pp. 52, 88; Hanson, 10th ed., p. 178; Green, 4th ed., p. 53), though it is right to add that some doubt is expressed in Dymond at p. 88. All three works state the practice of the office to be in accordance with the trustees' view. But the question must depend on the true construction of the relevant legislation, which is a matter for the court.

The point was touched on in *In re Harrison's Settlement* [1] by

[1] (1956) 35 Annotated Tax Cas. 144, 145.

Upjohn J., who was disposed to favour the view of the trustees in the present case.

Mr. Pennycuick, for the trustees, founded one of his arguments on the provisions as to settlement estate duty in section 5 (1) and (2) of the Act of 1894, which though repealed (with an immaterial saving in favour of the parties to a marriage) by sections 14 and 18 of the Finance Act, 1914, may, I think, properly be looked at for any aid they can give to the construction of section 1 of the same Act. As I understood this argument, it was to the effect that if section 5 (1) and (2) of the Act had remained in force the Crown could not have claimed settlement estate duty on the death of the deceased on the ground that the property, in the shape of the capital of the retained shares, passed on the death of the deceased under the disposition constituted by the deed of October 25, 1941, because that deed plainly effected no disposition of such capital, and that such a claim could only have been made good on the footing that the property which passed under that disposition was the limited interest in income to which it related. I may have misapprehended this argument, but it seems to me to come perilously near to begging the question, and I prefer to found myself on the more general considerations advanced by Mr. Pennycuick.

On the commissioners' side reference was made to section 15 (1) and (2) of the Finance Act, 1896, as mitigating the hardship alleged by Mr. Pennycuick to ensue from the method of assessment contended for by them. This is an argument to which I can attach little weight. The exemptions afforded by the two sub-sections referred to are restricted in scope and would cover only a small proportion of the possible types of derivative settlements.

We were referred to the well-known case of *Attorney-General* v. *Milne and Another*[2] for the observations made by Lord Parker of Waddington. This case was, I think, introduced into the discussion by Mr. Pennycuick in connexion with his argument concerning section 5 of the Act of 1894; but I refer to it for Lord Parker's general statement as to the effect of section 1. It is in these terms: "The first section of the Finance Act, 1894, imposes "in the case of every person dying after August 1, 1894, a duty, "called 'estate duty,' leviable on the capital value of all property "which passes on the death of such person. The expression "'property passing on the death' includes, according to the "definition contained in the 22nd section of the Act, property "passing either immediately on the death or after any interval "either contingently or certainly, and either originally or by way "of substitutive limitation, and the expression 'on the death' "includes 'at a period ascertainable only by reference to death.' "The expression 'passing on the death' is not further defined, "but is evidently used to denote some actual change in the title "or possession of the property as a whole which takes place at

[2] [1914] A.C. 765, 779, 780.

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"the death. For the purpose of this section it is absolutely "immaterial to whom or by virtue of what disposition the "property passes."

I cannot regard this general statement as meaning that where duty is claimed under section 1 on property comprised in a settlement on the death of a deceased person, on the ground that "some actual change in the title or possession of the property "as a whole" took place on his death under the trusts of the settlement, it is not necessary to ascertain what property was comprised in the settlement, and what was the nature of the trust relied on as bringing about the dutiable change in title or possession on the death in question.

We were also referred to *Christie* v. *Lord Advocate*,[3] where the daughter of the testator was entitled under his will to one-tenth of the income of the trust fund thereby constituted, reducible to a maximum of £600 per annum on the death of her mother. The daughter having died in the lifetime of her mother, it was held that there was a passing on the death of the daughter of the one-tenth of the capital of the trust fund corresponding to the one-tenth share of income to which she was entitled at the time of her death, and an argument that what should be valued for estate duty purposes was the right to one-tenth of the income during the life of the widow, reducible on her death to an annual sum not exceeding £600, was rejected. That case gives effect to a well established principle which I would not challenge for a moment; but it does not appear to me to touch the question as to the property comprised in the settlement which is the substantial point at issue here.

I would, however, quote this passage from *Christie* v. *Lord Advocate*[4] as having some bearing on the present case: "As Lord Macnaghten stated in the *Cowley* case,[5] the Finance "Act, 1894, has no regard to the destination of the property which "passes or to the interest of the deceased, which, if it be a limited "interest, can never pass. It was held in that case that on the "death of the first equitable tenant for life under a settlement "of real estate the property which passed on his death was "neither the interest of the first tenant for life nor the interest "of the second tenant for life who succeeded him, but the settled "property. That case, in my opinion, is conclusive, and estab-"lishes that on the death of Mrs. Norman, the liferenter of "one-tenth, the settled property (which for this purpose is the "capital fund which produced the income to which she was "entitled) passed on her death within the meaning of section 1 "of the Act."

That passage appears to me to be wholly consistent with the trustees' contention in the present case. That which passed on the death of the deceased was the settled property, and the settled property was (quoad the deed) the income arising from

[3] [1936] A.C. 569; [1936] 1 All E.R. 443.

[4] [1936] A.C. 569, 576.

[5] [1899] A.C. 198, 212.

the retained shares during the 21-year period or until the previous death of the daughter, and (quoad the order), in the event of the daughter's death during that period, so much (if any) of the income arising during the residue of that period as the trustees might think fit to distribute under the authority given by the order in lieu of accumulating it under the trusts of the codicil.

I now turn to Mr. Milner Holland's argument that the combined effect of the order and the deed was to accelerate the interests in the income of the retained shares which, according to the trusts of the codicil, were only to come into operation after the expiration of the 21-year period. For the purposes of this part of his argument, Mr. Milner Holland, while not admitting, was not concerned to dispute the general principles regarding derivative settlements propounded by the trustees. He said (in effect) that whatever the position might be in other cases, in the present case the result of the deed and the order was to put the deceased in immediate possession of the income interest to which under the terms of the codicil he was only to become entitled at the expiration of the 21-year period, and in the event of his being alive at such expiration.

Under the deed (so the argument proceeded) the deceased by virtue of the referential trust thereby declared became entitled in possession to such share of the income of the retained shares during the 21-year period or until the previous death of the daughter as should from time to time be directed to be applied for his benefit. Under the codicil he was already entitled in expectancy to a like interest in the income of the retained shares after the expiration of the 21-year period, provided he should then be living. It is true that under the codicil there was interposed between these two interests a trust for accumulation of the income from the death of the daughter until the expiration of the 21-year period in the event of her death during that period. But this trust was virtually abrogated by the order which authorized the trustees in lieu of accumulating the income to deal with it on the footing applicable to income to arise after the expiration of the 21-year period. In the result, therefore, the deceased was at the time of his death entitled in possession to a share (fixed by the current direction at one-fifth) of the income of the retained shares during the lives and life of the nephew and the nephew's wife and the survivor of them, defeasible on his death in the lifetime of such survivor, and liable also in the event of the death of the daughter during the 21-year period to be temporarily defeated during the residue of that period if, and to the extent to which, the trustees might in that event decide to accumulate the income during the residue of that period notwithstanding that the order authorized them not to do so. The risks of defeasance or interruption attending the deceased's income interest as above described do not affect the claim to duty on a share in the capital of the trust fund corresponding to the share of income to which

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(no matter for what period) the deceased was entitled in possession at the time of his death. (See *Christie* v. *The Lord Advocate.*[6])

I cannot accept this argument. There was nothing here in the nature of a surrender or release. The deed as it appears to me disposed of the income of the retained shares during the 21-year period or until the previous death of the daughter as a distinct item of property, and on the footing that during the 21-year period or until the previous death of the daughter and no longer the referential trust was to take effect with respect to that property by virtue of that deed. It is in my view quite wrong to disregard the trust for accumulation or to invert the true position in regard to it by treating it as a trust for accumulation of so much (if any) of the income as the trustees might decide. It remained (in the contingency of the daughter's death during the 21-year period) a trust for accumulation save in so far as it might be displaced by any decision of the trustees to distribute without regard to it in reliance on the authority given by the order. It appears to me that the interposition of the trust for accumulation effectively prevented the transaction from bringing about the suggested acceleration and precluded any merger or coalescence of the trusts declared by the codicil after the expiration of the 21-year period and the trusts declared by the deed in respect of the income arising during the 21-year period or until the previous death of the daughter.

Some colour is lent to this part of Mr. Milner Holland's argument by the circumstance that the trustees of the deed were the same persons as the trustees of the testator's will and codicil. But this cannot in my view affect the legal position.

For the reasons I have endeavoured to state, I accept the trustees' contention as to the property comprised in the settlement and passing on the death of the deceased, and reject the commissioners' contention as to acceleration.

As to the commissioners' alternative claim under section 2 (1) (*b*), no such claim can arise on the footing that section 1 is applicable, and in any case a claim on that basis, if it could be entertained, could only produce the same result on the footing that the trustees' contention as to the property comprised in the settlement is accepted, as I think it should be.

For these reasons I would allow this appeal.

ROMER L.J. I agree. I am quite unable to accept the trustees' contention that Geoffrey Harrison was a member of a discretionary class consisting of himself and his two sisters and that accordingly no income passed or could be deemed to have passed on his death within the meaning of section 1 or section 2 of the Finance Act, 1894. I agree with the reasons stated by Jenkins L.J. in his judgment, which I have had the advantage of

[6] [1936] A.C. 569.

reading, for rejecting this submission and have nothing to add with regard to it.

On the principal question it is, I think, clear that on the death of Geoffrey on October 7, 1955, estate duty became payable under section 1 of the Act. The reason for this is that the share of income from the retained shares which he was enjoying at his death became payable thereafter to other persons, viz. his sisters or one of them. As a result there was a passing of property on his death and the only question is—of what did that property consist? The judge held that the property was one-fifth of the capital of the retained shares settled by the testator's codicil; the appellants contend in effect that it was one-fifth of the property settled by the deed of October 25, 1941.

The terms of this deed were not precisely in accord with the order made by Simonds J. on November 1, 1940. That order required that the interests of Jeannette Wightman-Harrison and the steamship companies in the income to arise from the shares settled by the codicil and the investments for the time being representing the same during the period of 21 years from the date of the testator's death should be "assured" to the trustees of his will. The deed of October 25, 1941, did not assure these interests to the trustees but took the form of a declaration by Mrs. Wightman-Harrison and the companies that the interests should be held by the trustees upon the referential trusts therein mentioned, which were in fact the trusts authorised by the order. It seems to me, however, that this discrepancy between the order and the deed is immaterial.

The "interests" dealt with by the order and the deed were the beneficial interests of the companies in the income of the retained shares during a period of 21 years from the testator's death or until the daughter's earlier death and such interest as the daughter herself might have in the same income, and for the same period, as the testator's sole next-of-kin. This income was the only relevant property which the companies and Mrs. Wightman-Harrison possessed and they settled it by the deed of 1941.

Immediately prior to the execution of this deed Geoffrey had no beneficial interest whatever in this property of Mrs. Wightman-Harrison and the shipping companies. The property was certainly income, payable for an uncertain but limited period, of the retained shares but (apart from the "authority" conferred on the trustees by the order of 1940) Geoffrey's only beneficial interest in any income of the retained shares was expectant on his surviving the testator by 21 years. It seems to me that the effect of the deed of 1941 was not to accelerate Geoffrey's interest in the retained shares under the codicil trusts but to create new interests under a separate trust, which had not existed previously, of segregated property. The fact that the limitations of the income declared by that trust were, by reference, the same as those of the codicil trusts under which Geoffrey would have

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become entitled had he lived long enough, does not prevent the limitations from constituting a separate and independent trust, and I think that they did. If that view be right it follows, as it seems to me, that the beneficial interest which Geoffrey was enjoying at the time of his death was an interest arising under the deed and not an interest arising under the codicil. What then was the "property" in which that interest subsisted? The answer to that question must surely be the property settled by the deed, namely, the income of the retained shares of which Mrs. Wightman-Harrison and the shipping companies were the beneficial owners. This answer would perhaps have been still clearer if the "assurance" envisaged by the order of 1940 had been effected and if such assurance had been made in favour of trustees other than the trustees of the testator's will and codicil; but in my opinion the transaction, even in the form which it took, sufficiently established a sub-settlement of "property" which, although deriving in a sense from the codicil settlement, had an independent existence of its own. Mr. Pennycuick submitted in effect that the expression "settled property" in section 1 of the 1894 Act is referable to property which is settled by a disposition and which passes under *that* disposition; and that the section should in this regard be confined to property passing under a disposition on the death of a person entitled under *that* disposition. It appears to me that, at all events in general, this contention is well founded and, applying it to the present case, the disposition under which Geoffrey was entitled at his death to one-fifth of the income of the retained shares was, in my opinion, the deed of 1941 and not the testator's codicil. The fact that but for the provisions of the codicil the deed could have had no effective operation has, as it seems to me, no relevant materiality. On these grounds it appears to me that the appellants are entitled to the declaration claimed subject to the point, to which my Lord has referred, that regard should also be had to the benefit which might have accrued to Geoffrey during the 21-year period under the authority conferred on the trustees by the order of 1940.

The considerations which, if correct, defeat a claim to duty under section 1 of the Act on the value of one-fifth of the corpus of the retained shares also, by parity of reasoning, are an answer to the Crown's alternative claim based on section 2 (1) (*b*).

JENKINS L.J. I am authorized by Willmer L.J. to say that he concurs in the judgments which have just been delivered.

Appeal allowed. Leave to appeal.

Solicitors: *Gerrish & Co.; Solicitor for Inland Revenue.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

In re HUNT.

1958
Dec. 16.

Lord Parker C.J., Cassels and McNair JJ.

Contempt of Court—Committal order—Litigant in person—Whether privileged from arrest—Civil contempt.
Arrest—Privilege from—Court precincts—Litigant in person—Civil contempt.

On a motion by defendants for committal of the applicant as plaintiff in the action for contempt of court in failing to attend an appointment before an examiner of the court, pursuant to R.S.C., Ord. 42, r. 32, the applicant defended himself in person and the judge ordered him there and then to be committed and he was arrested in court and taken to Brixton Prison. He applied for a writ of habeas corpus, claiming that he had been wrongfully arrested on the ground, inter alia, that he was privileged from arrest while he was in court to conduct his case in person:—

Held, that the only privilege from arrest that existed in the circumstances was a privilege of the court to ensure that justice was done by preventing anyone properly before the court from being arrested, and that the application failed.

Cameron v. *Lightfoot* (1778) 2 Wm.Bl. 1189; *In re Evans* [1893] 1 Ch. 252 applied.

APPLICATION for habeas corpus.

On November 4, 1958, Allied Bakeries Ltd. brought a motion before Wynn-Parry J. to commit the applicant, Kenneth Douglas Hunt, to Brixton Prison for contempt of court in failing to attend an appointment before an examiner of the court. Hunt defended the motion in person. The judge, being of the opinion that the applicant had no intention of attending any examination that might be fixed, ordered him there and then to be committed to Brixton Prison. The applicant applied for habeas corpus (inter alia) on the ground that he was privileged from arrest while in court to conduct his case in person.

The applicant appeared in person.

Rodger Winn for the Governor of Brixton Prison.

Bernard Gillis Q.C. and *W. Denny* for Allied Bakeries Ltd.

The following cases were cited in argument: *Reg.* v. *Board of Control, Ex parte Rutty* [1]; *Hammond* v. *Howell* [2]; *Cameron* v. *Lightfoot* [3]; *In re Evans* [4]; *Holbern* v. *Fowler* [5]; *In re Preston* [6]; *In re Johnson* [7]; *In the matter of Clarke.* [8]

LORD PARKER C.J. The applicant, Kenneth Douglas Hunt, was committed on November 4, 1958, to Brixton Prison for

[1] [1956] 2 Q.B. 109; [1956] 2 W.L.R. 822.
[2] (1793) 1 Leach Mod.Rep. 184.
[3] (1778) 2 Wm.Bl. 1189.
[4] [1893] 1 Ch. 252.
[5] (1893) 62 L.J.N.S. 49.
[6] (1883) 11 Q.B.D. 545.
[7] (1888) 20 Q.B.D. 68.
[8] (1844) 2 Q.B. 619.

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contempt in disobeying an order of the court. He now applies to this court in person for a writ of habeas corpus. He has raised every conceivable point, but there is no doubt that the one which has been developed at greatest length, and the one with which this court is really concerned, goes to the question as to whether he was properly arrested.

There was a motion by certain defendants, Allied Bakeries Ltd., before Wynn-Parry J., to commit the applicant to Brixton Prison for contempt of court in failing to attend an appointment before an examiner of the court. The judge, having heard the case, came to the conclusion that the applicant, who was then the plaintiff in that action, had no intention of attending any examination that might be fixed, and he there and then ordered him to be committed to Brixton Prison; the tipstaff, who had arrived in court, arrested him and took him to prison. In those circumstances the applicant says he was wrongfully arrested, because he claims that he had some privilege from arrest while he was in the court. Apart from that point, he takes some four or five other points, all of which admittedly have been raised by him on an appeal to the Court of Appeal [1] from the judgment of Wynn-Parry J. He says that some of the points were not dealt with by the Court of Appeal. That no doubt is so. If one reads the judgment it appears that point after point was taken before the Court of Appeal, as indeed they have been taken before this court. The fact that the Court of Appeal did not deal with all of them expressly does not mean that they had any doubt on the matter, because the appeal was dismissed; therefore every point he took before the Court of Appeal was decided, whether expressly or impliedly, against him. It may be, and I find it unnecessary to decide, that that decision of the Court of Appeal is res judicata in these proceedings, but whether it is or not, approaching the matter de novo and having heard all the arguments raised by the applicant, I see no reason, even if I am at liberty to do so, to come to any other view than that taken by the Court of Appeal. Accordingly, so far as all his points other than that concerning privilege from arrest are concerned, in my judgment the applicant completely fails.

This question in regard to the privilege from arrest is an interesting one. The applicant agrees that in the case of special contempt, which he would class as contempt in the face of the court and criminal contempt and matters of that sort, there is no privilege against arrest within the precincts of the courts; but he contends that when it is a case of ordinary contempt—merely of disobeying an order of the court—a litigant before the court has complete immunity from arrest while in the precincts of the court. Accordingly, he complains that he was wrongfully arrested in Wynn-Parry J.'s court, and that he is wrongfully detained in Brixton Prison.

[1] *Hunt* v. *Allied Bakeries Ltd.* (*No.* 2) [1959] 1 W.L.R. 50; [1959] 1 All E.R. 37.

I find it unnecessary to go through all the history of the matter. It seems to me clear that it is a misconception to talk about a litigant or a solicitor or a witness having immunity from arrest while within the precincts of the court. The truth of the matter is that the privilege, if privilege there be, is a privilege of the court to ensure that justice is done, and for that purpose to prevent anybody properly before the court from being arrested. That seems perfectly clear if one looks at one or two of the authorities. If one goes back to 1777 and 1778, it will be seen in *Cameron* v. *Lightfoot*[2] that this matter was fully dealt with, and De Grey C.J. said[3]: "The question therefore is, "whether the privilege of the King's Court, extended to suitors "redeundo, so vitiates an arrest, or suspends the operation of "the writ, that the taking a man thereon becomes an act of "trespass to the party taken. The ancient way of availing one-"self of the privilege of the courts was by suing out a writ of "privilege for suitors, jurors, and witnesses. But this privilege "is not considered as the privilege of the person attending the "court, but of the court which he attends." There the matter is being dealt with, as I have said, not as a privilege of the litigant, but as something which the court has power to do in order that there should be a proper administration of justice.

Again, in the Consolidated Orders in Chancery in 1860 it was provided by Order 42, r. 1: "Officers and attendants upon the "court, suitors and witnesses, are to have privilege eundo, "redeundo, et morando, for their necessary attendance, but not "otherwise; and where any of them are arrested at such times "of necessary attendance, it is a contempt of court." True, those Orders in Chancery were repealed in 1883, but it has always been assumed that, whether by reason of R.S.C., Ord. 72, r. 2, or, indeed, at common law, the rights that existed before 1883 remain.

It is also to be observed that in Chitty's Archbold's Practice (1885), vol. 2, p. 1484, the matter is put perfectly clearly. It reads: "Every person connected with a cause, and attending in "the course of it, whether compelled to attend by process or not, "such as parties, witnesses, bail, solicitors, etc., are privileged "from arrest whilst going to, attending, and returning from court, "or the judges' chambers." Then it provides that barristers have the same immunity. Then a little later on the page it says that it is not considered as the privilege of the person attending the court, but of the court which he attends, and at p. 1487 it is laid down that where an arrest has been made in court and complaint is made of that arrest, the complaint is made to the judge in question. It is perfectly clear from that that it is a privilege of the court, and in Daniell's Chancery Practice, 8th ed., vol. 1, pp. 776 and 777, it is provided, in much the same terms: "Officers and attendants upon the court, suitors, and witnesses

[2] (1778) 2 Wm.Bl. 1189. [3] Ibid. 1192.

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"are to have privilege eundo redeundo et morando for their "necessary attendance, but not otherwise, and when any of them "are arrested at such times of necessary attendance it is a con-"tempt of court. A solicitor who is proceeding to the court to "attend to his professional business there pending is privileged "from arrest; and the question in such cases is, whether, at the "time of his arrest, he was bona fide proceeding in a direct line "to or from the court. The solicitor is also privileged if he is on "his way to attend an appointment at the offices of the court. "If the first arrest is bad, all the detainers lodged under it are "also bad. The application to discharge must be made to that "court of which the arrest is a contempt."

From those authorities and textbooks it seems to me clear, as indeed one would expect, that this so-called privilege from arrest is a power which every court has to see that justice is done in the court, and for that purpose that people properly in the court are not interfered with by being arrested and prevented from assisting the court and carrying on their business in the court. In so far as it is said to be a privilege of the person attending the court, the privilege is no more than this, that they are entitled to rely on the judge of that court to see that justice is not interfered with by their being arrested. What is clear is that there is nothing to suggest that a person is privileged from arrest in a court if the arrest is done on the order of that court; indeed, it would be very surprising if that were not so. The truth of the matter is that certainly before 1893, as is shown by Mr. Registrar Lavie's note in *In re Evans*,[4] it had always been the practice for a person, though properly before the court, to be committed by the court and arrested in court, not only if he had been guilty of what is called special contempt, but also in the case of ordinary contempt. Accordingly, in my judgment, there is nothing in the applicant's point in regard to wrongful arrest. In these circumstances I would refuse this application.

I should perhaps add that I have deliberately avoided the debate as to how far this court sitting as a Divisional Court can inquire into matters of committal. It may be that the true view is, and I think the cases support it, that though this court always has power to inquire into the legality of the committal, it will not inquire whether the power has been properly exercised. However, in this case I am quite satisfied that the application fails.

CASSELS J. I agree.

MCNAIR J. I also agree.

Application refused.

Solicitors: *Treasury Solicitor; A. Kramer & Co.*

J. D. P.

[4] [1893] 1 Ch. 252.

[CHANCERY DIVISION.]

BARCLAYS BANK LTD. *v.* INLAND REVENUE COMMISSIONERS.

1958
Dec. 5, 9, 17.

Danckwerts J.

[1958 B. 3270.]

Revenue — Estate duty — Valuation — Shares — Control of company — Shares held by deceased beneficially—Further shares held as trustee —Whether register of members conclusive—Whether deceased in control of company—Method of valuation—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55 (*as amended by Finance Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 47, *Sch.* 11).

Company — Control — Estate duty purposes — Trustee shareholder — Register of members—Whether conclusive—Finance Act, 1940, *s.* 55. *Meaning of "deemed"—Humpty Dumpty.*

At the date of his death on December 15, 1955, the deceased owned beneficially 1,100 shares in a company. By a settlement made on December 1, 1936, he had settled 3,650 shares in the same company upon trust for his wife and children, he himself taking no benefit. The deceased had always been a trustee of the settlement. His name appeared as the first of the four trustees' names in the company register, and since Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the company's articles of association, it was he who exercised the powers of voting.[1] The issued share capital of the company had always been 8,350 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital.

The trustees took out a summons to determine whether the deceased had control of the company within the meaning of section 55 of the Finance Act, 1940,[2] in which event the 1,100 shares

[Reported by MISS MARGARET THOMAS, Barrister-at-Law.]

[1] Companies (Consolidation) Act, 1908, Table A:—Art. 60: "... On "a poll every member shall have one "vote for each share of which he is "the holder."

Art. 61: "In the case of joint "holders the vote of the senior who "tenders a vote, whether in person "or by proxy, shall be accepted to the "exclusion of the votes of the other "joint holders; and for this purpose "seniority shall be determined by the "order in which the names stand in "the register of members."

[2] Finance Act, 1940, s. 55, as amended: "(1) Where for the pur-"poses of estate duty there pass, on "the death of a person dying after "the commencement of this Act, "shares in or debentures of a com-"pany to which this section applies, "then if (*a*) the deceased had the "control of the company at any time "during the five years ending with "his death ... the principal value "of the shares or debentures, in lieu "of being estimated in accordance "with the provisions of section 7 "(5) of the Finance Act, 1894, "shall be estimated by reference "to the net value of the assets "of the company in accordance with "the provisions of the next succeed-"ing subsection. ... (3) For the "purposes of this section a person "shall be deemed to have had control "of a company at any time if he "then had (*a*) the control of powers "of voting on all questions, or on "any particular question, affecting "the company as a whole which if "exercised would have yielded a "majority of the votes capable of "being exercised thereon ... or if "he could have obtained such con-"trol ... by an exercise at that

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should be valued for estate duty by reference to their assets value in accordance with section 55 (2), or, whether they should be valued by reference to their market value under section 7 (5) of the Finance Act, 1894:—

Held, (1) that under section 55 (5) of the Act of 1940 it was necessary to investigate the true position of a registered holder to see whether he was in fact a trustee or in some other fiduciary capacity in respect of someone else, so that the rule often laid down that the company and the court could not look beyond the register did not apply.

(2) That in the present case such investigation showed that the deceased could not exercise his vote freely but was bound to act on the unanimous decision of the four registered trustee shareholders.

(3) That having regard only to subsection (1) of section 55, without recourse to subsection (3), the deceased had not "the control "of the company" as opposed to "a controlling interest in" the company within the meaning of the authorities; nor had he "the "control of powers of voting on all questions . . ." within the meaning of subsection (3) (*a*).

(4) That, accordingly, the deceased did not have control of the company within the meaning of section 55, and the shares should be valued under section 7 (5) of the Act of 1894.

Inland Revenue Commissioners v. *J. Bibby & Sons Ltd.* (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167 and *Inland Revenue Commissioners* v. *Silverts Ltd.* [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C. 491 distinguished.

British American Tobacco Co. Ltd. v. *Inland Revenue Commissioners* [1943] A.C. 335; [1943] 1 All E.R. 13; 29 T.C. 49 and *S. Berendsen Ltd.* v. *Inland Revenue Commissioners* [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 447 considered.

ADJOURNED SUMMONS.

The deceased, Tom Shipside, died on December 15, 1955, having, by his will dated December 18, 1952, appointed the plaintiffs to be his executors and trustees. Probate was granted to them on March 24, 1956. The estate of the deceased included at his death 1,100 fully paid ordinary £1 shares in T. Shipside Ltd. registered in the sole name of the deceased, and these shares he owned beneficially. By a settlement dated December 1, 1936, the deceased settled 3,650 fully paid ordinary £1 shares in the company upon trust for the benefit of his wife and his children, he himself taking no beneficial interest. The deceased and two other persons were the original trustees, but as a result of appointment made on November 30, 1948, when one of the original trustees retired, the deceased and three other persons became the trustees and remained so until the deceased's death. The 3,650 shares were registered in the company's register of members in the names of the four trustees, the name

"time of a power exercisable by him "or with his consent. . . . (5) Con- "trol of a company which a person "had in a fiduciary capacity shall be "disregarded for the purposes of this "section. . . ."

S. 58 (5): "References in this Part "of this Act to a person having any "power or control or doing any act in "a fiduciary capacity shall be con- "strued as references to his having "that power or control or doing that "act in a fiduciary capacity imposed "on him otherwise than by a dis- "position made by him and in such "a capacity only."

of the deceased appearing as the first holder. The company had been incorporated under the Companies Acts, 1908 to 1917, and Table A of the Companies (Consolidation) Act, 1908, had been incorporated in the articles of association. The deceased was therefore the person with the right to exercise the votes.

The issued share capital of the company had always been 8,350 ordinary £1 shares, so that the 3,650 settled shares and the 1,100 shares held beneficially together amounted to more than half the issued share capital. It being uncertain whether the deceased had control of the company so as to affect the valuation of the 1,100 shares for estate duty, the plaintiffs took out a summons to determine whether, upon the true construction of section 55 of the Finance Act, 1940, the principal value of the 1,100 shares should be estimated in accordance with the provisions of section 55 (2) of the Act of 1940, or in accordance with section 7 (4) of the Finance Act, 1894. If the former method, which required the value of the shares to be estimated by reference to the net value of the company's shares, were adopted, the burden of estate duty would be higher than if the valuation were made under section 7 (5) of the Act of 1894, which provided for a valuation by reference to the market value of the shares.

B. L. Bathurst Q.C. and *Denys Buckley* for the plaintiffs.

John Pennycuick Q.C. and *E. Blanshard Stamp* for the defendants.

The following case, in addition to those referred to in the judgment, was cited in argument: *In re Parsons.*[3]

Cur. adv. vult.

December 17. DANCKWERTS J., reading his judgment, stated the facts and continued: It was pointed out on behalf of the plaintiffs that trustees of a private trust can only exercise powers of a discretionary character upon the unanimous decision of all the trustees, and if they cannot reach agreement they cannot exercise the power at all. Consequently, it was argued that the deceased could not have exercised lawfully the right to vote in respect of the settled shares, except under the authority of the decision of all four trustees, and he would be restrainable by injunction if he sought to disregard the wishes of his co-trustees. Therefore, in actual fact he had not control of the powers of voting in respect of the settled shares, and he had not control of the company.

On behalf of the Commissioners of Inland Revenue, the principal contention was that it was not permissible in applying the Act to go behind the articles of association and the company's

[3] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

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register, and, therefore, the deceased, by virtue of his registration as the first of the joint holders, and the provisions of article 61 of Table A, had control of the company, and any obligations that he might owe to his co-trustees could be disregarded.

I was referred to a number of authorities, none of which was a decision in respect of section 55 of the Finance Act, 1940. In *B. W. Noble, Ltd.* v. *Inland Revenue Commissioners*[1] the question arose on section 53 (2) (*c*) of the Finance Act, 1920, relating to corporation profits tax, whether a director had "a "controlling interest in the company." The chairman of the directors held half the ordinary shares of the company, and was entitled, upon equal division of opinion among the shareholders, to a casting vote. It was held that he had a controlling interest in the company. Rowlatt J. said[2] that "controlling interest" was a phrase which had a certain well-known meaning; it meant the man whose shareholding in the company was such that he was the shareholder who was more powerful than all the other shareholders put together in general meeting.

That case was approved by the House of Lords in *British American Tobacco Co. Ltd.* v. *Inland Revenue Commissioners*[3] which was a case concerned with the levying of national defence contribution under the Finance Act, 1937, Schedule IV, para. 7 (*b*) on a body corporate. The relevant statutory provision required inclusion in the body corporate's profits for this purpose of "all income received by way of dividend or distribution of profits "from any other body corporate in which the first-mentioned "body has a controlling interest and which is not liable to be "assessed to the national defence contribution."

The conclusions of the House of Lords appear to have been that (1) the words "controlling interest" included not only direct control of the company which it is sought to tax, but also an indirect controlling interest, such as the holding of a controlling interest in another company which itself held a controlling interest in the company liable to be assessed to the national defence contribution; and (2) the holding of a bare majority of voting power in a company was in general sufficient to constitute "a "controlling interest," and it was not necessary to hold such a proportion of the shares as would secure the passing of a resolution for which a special majority was required.

In the present case the Commissioners of Inland Revenue principally relied upon *Inland Revenue Commissioners* v. *J. Bibby & Sons Ltd.*[4] This was a case relating to excess profits tax under section 13 (9) of the Finance (No. 2) Act, 1939, and the material question was whether the directors of the company had "a controlling interest therein," that is, in the company. The directors held in their own right shares of the company which

[1] (1926) 12 T.C. 911.
[2] Ibid. 926.
[3] [1943] A.C. 335; [1943] 1 All E.R. 13; 29 T.C. 49.
[4] (1945) 61 T.L.R. 430; [1945] 1 All E.R. 667; 29 T.C. 167.

amounted to less than 50 per cent. of the ordinary share capital of the company. But three of the directors, who were brothers and the trustees of a marriage settlement of a sister, were the registered joint holders of 57,000 ordinary shares. The three brothers had a contingent beneficial interest under the settlement in the event of the death of their sister without issue. If these shares were added to the 209,332 shares held by the directors in their own right they would amount to more than 50 per cent. of the company's 500,000 ordinary shares. The Court of Appeal held that, apart from the special case of a bare trustee, shares of the company owned by the directors as trustees should be taken into account in ascertaining whether the directors had a controlling interest therein; and the House of Lords, without expressing an opinion upon the case of a bare trustee, unanimously affirmed the order of the Court of Appeal.

Apart from the consideration that the decision of the House of Lords was dealing with a different statute, a distinguishing feature of that case is plainly the fact that the three directors were the only trustees of the settlement which comprised the shares, and so the decision lay with them as to the way in which the votes in respect of the settled shares should be cast. But reliance was placed on behalf of the Commissioners of Inland Revenue upon the observations which their Lordships made in the course of their speeches. Lord Russell of Killowen, after referring to the opinion of the Court of Appeal that, apart from the special case of a bare trustee, there was no halfway house between an interpretation which limits the expression to the case of beneficial ownership and one which includes ownership by trustees, irrespective of the fact whether or not they also have some beneficial interest in the shares which give control, said [5]: "My Lords, I agree with the view of the Court of Appeal. When "the section speaks of directors having a controlling interest in "a company, what it is immediately concerned with in using "the words 'controlling interest' is not the extent to which the "indivduals are beneficially interested in the profits of the com-"pany as a going concern or in the surplus assets in a winding up, "but the extent to which they have vested in them the power "of controlling by votes the decisions which will bind the com-"pany in the shape of resolutions passed by the shareholders in "general meeting. In other words, the test which is to exclude "a company's business from subsection 9 (*a*) and include it in "9 (*b*) is the voting power of its directors, not their beneficial "interest in the company."

"For the purpose of such a test, the fact that a vote-carrying "share is vested in a director as trustee seems immaterial. The "power is there, and though it be exercised in breach of trust or "even in breach of an injunction, the vote would be validly cast "vis-à-vis the company, and the resolution until rescinded would

[5] 29 T.C. 167, 179.

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"be binding on it. The contention that upon the wording of "section 13 the interest must be confined to beneficial interests "appears to me to be but a repetition of the argument which was "rejected by this House in the case of *British American Tobacco* "*Co. Ltd.* v. *Inland Revenue Commissioners*,[6] in relation to "national defence contribution and the Finance Act, 1937."

Lord Macmillan said[7]: "The question whether the directors "of the respondent company have the control of it by their voting "power as shareholders must, in my view, be determined by the "memorandum and articles of the company and by the register "of shareholders. By the constitution of the company, as I have "already mentioned, the voting power is vested in the ordinary "shareholders, and the register shows that the directors hold a "majority of these shares. As was said by Sir George Jessel "M.R. in *Pulbrook* v. *Richmond Consolidated Mining Co.*[8]: 'The "'company cannot look behind the register as to the beneficial "'interest, but must take the register as conclusive, and cannot "'inquire . . . into the trusts affecting the shares.' So far as "the company is concerned the relation between such of its "shareholders as happen to be trustees and their beneficiaries is "res inter alios. It may be that a trustee-shareholder may, "as between himself and his cestuis que trust, be under a duty "to exercise his vote in a particular manner or a shareholder "may be bound under contract to vote in a particular way (com-"pare *Puddephatt* v. *Leith*[9]). But with such restrictions the "company has nothing to do. It must accept and act upon the "shareholder's vote, notwithstanding that it may be given con-"trary to some duty which he owes to outsiders. The remedy for "such breach lies elsewhere."

Lord Simonds said[10]: "What, my Lords, constitutes a con-"trolling interest in a company? It is the power by the exercise "of voting rights to carry a resolution at a general meeting of "the company. Can the directors of the respondent company "by the exercise of their voting rights carry such a resolution? "Yes: for they are the registered holders of more than half "the ordinary shares of the company. Therefore they have a "controlling interest in the company. . . . My Lords, in my "opinion the Crown's contention cannot be sustained. Those "who by their votes can control the company do not the less "control it because they may themselves be amenable to some "external control. Theirs is the control, though in the exercise "of it they may be guilty of some breach of obligation, whether "of conscience or of law. It is impossible (an impossibility long "recognized in company law) to enter into an investigation "whether the registered holder of a share is to any and what "extent the beneficial owner. A clean cut there must be."

[6] [1943] A.C. 335.
[7] 29 T.C. 167, 181.
[8] (1878) 9 Ch.D. 610, 615.
[9] [1916] 1 Ch. 200; 32 T.L.R. 228.
[10] 29 T.C. 167, 184.

John Shields & Co. (Perth) Ltd. v. *Inland Revenue Commissioners*[11] was also an excess profits tax case depending on the meaning of "a controlling interest" in section 13 (9) of the Finance (No. 2) Act, 1939. At all material times more than half the share capital of the appellant company was held by the trustees of the will of the former governing director. The voting rights in respect of these shares resided, under the company's articles of association, in the trustee first named on the company's register, unless all the trustees nominated one of their number for this purpose. No such nomination was made, and the voting rights were held by the first-named trustee, who was not a director of the company. In accordance with their powers under the articles of association, the trustees appointed as governing director of the company one of their number, who was thus in a position to arrange for his own name to appear first on the company's register in respect of the trust shareholding, or to require any member of the company to retire from his membership and to transfer his shares to another member at a valuation. In fact, the governing director so appointed did not exercise these powers. It was held by the Scottish Court of Session that the directors did not have a controlling interest in the company within the meaning of section 13 (9) of the Act. The ground of the decision was that whatever the potentialities of the governing director's powers, by not using them he left the controlling interest in the hands of the trustee who was not a director of the company.

The next case is *Inland Revenue Commissioners* v. *Silverts Ltd.*[12] At all material times four persons were directors of the company. All the "B" shares, which carried half the voting rights, were vested in one of the directors. The "A" shares, which carried the other half of the voting rights, were the subject of a settlement, and were vested in a bank as the custodian trustee of the settlement within the meaning of section 4 of the Public Trustee Act, 1906. Two of the directors were the managing trustees of the settlement. It was held by the Court of Appeal that the bank as a registered holder of all the "A" shares was not merely a nominee or bare trustee; that therefore the controlling interest in the shares must be treated as being in the bank, and it was not possible to investigate the character in which the bank exercised its voting rights as shareholder by reference to the terms of the settlement or of section 4 of the Public Trustee Act, 1906, or otherwise; and that the directors, accordingly, had not a controlling interest in the company.

This was a profits tax case under the Finance Act, 1937. There is a passage in the judgment of the court delivered by Lord Evershed M.R. which is of interest. He said[13]: "In our

[11] 29 T.C. 475.

[12] [1951] Ch. 521; [1951] 1 T.L.R. 593; [1951] 1 All E.R. 703; 29 T.C 491.

[13] [1951] Ch. 521, 531.

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"judgment, the ratio decidendi in *Bibby's* case [14] is that, in "accordance with well-established principles relating to limited "companies, a question of the rights of members vis-à-vis the "corporation (such as that of voting control under its regulations) "is to be determined by reference, and by reference only, to the "share register beyond which it is not (save possibly in the case "of mere 'nominee' shareholders) permissible to look; and not "that, in the case of a trust, the powers and discretions of exer-"cising votes in regard to shares must be treated as reposing in "the trustees without regard to the terms of the trust or the "right of beneficiaries to direct such exercise. Thus, if (because "the shares were registered in the names of 'nominees' or 'bare "'trustees' or otherwise) it were in any circumstances permis-"sible to look beyond the share register, we do not think the "speeches in the *Bibby* case [15] would prevent inquiry being made "whether those individuals to whom the nominee shareholders "were answerable were themselves obliged by contract or other-"wise to give directions in accordance with instructions received "from some third party." And with reference to the *Bibby* case [15] and the *British American Tobacco* case [16] it is pointed out that in neither case was the question the general one: who controls the company? [17]

The last case is *S. Berendsen Ltd.* v. *Inland Revenue Commissioners.*[18] A company had an issued share capital of 1,000 shares, each of which carried one vote at meetings of the company. The directors of the company between them held 401 of the shares, carrying less than 50 per cent. of the votes at meetings, and a Danish company held 590 shares, carrying over 50 per cent. of the votes. The shareholding of one of the company's directors in the Danish company gave him control of the voting power of the Danish company. On an assessment to profits tax, it was contended by the Crown that the shares of the Danish company should be added to the shares held by the directors for the purpose of ascertaining whether a controlling interest in the company was held by the directors within the meaning of Schedule IV, para. 11, to the Finance Act, 1937, as amended by section 34 of the Finance Act, 1952.

Wynn-Parry J. (not surprisingly, in view of the cases to which I have referred) held that the share register of the company was the sole test in deciding the ownership of shares, and that it was not permissible to go beyond the register to ascertain whether the directors in fact owned any further shares. But the Court of Appeal reversed this decision, and held that where a registered shareholder was a body corporate it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate; and that since the Danish company (which was the majority shareholder in the English company) was itself

[14] 29 T.C. 167.
[15] Ibid.
[16] [1943] A.C. 335.
[17] Ibid. 532.
[18] [1958] Ch. 1; [1957] 3 W.L.R. 164; [1957] 2 All E.R. 612.

controlled by one of the directors of the English company, the directors of the English company had "a controlling interest "therein" for the purpose of the relevant statutory provision.

It seems to me that in the last case the court, in the search for "the controlling interest," went beyond the articles of the company which was the subject of the inquiry. But on behalf of the commissioners it was sought to distinguish and account for this feature of the case by confining the decision to a case in which it is found that the shareholder on the company's register is a corporation which is incapable of exercising volition and must act through the agency of some human person. If, therefore, it is said, such a person is identified as being the person who by his votes controls the member corporation and he is a director of the original company, then he comes within the description of a director who has "a controlling interest therein." None the less, it appears to me that this result has been reached by examining the position of the shareholder in regard to circumstances which are outside the provisions of the company's articles.

However that may be, it was contended on behalf of the commissioners that the effect of the cases which I have mentioned is that I am bound to have regard only to the fact that by virtue of the company's articles the deceased, as the first on the register of the joint shareholders, alone could vote in respect of the settled shares and I am not entitled to have any regard to the fact that he was merely one of a body of trustees who were in fact, in law and on the register the owners of the shares in question.

Those cases were, however, all cases decided on statutes which were different from the statute on which the present case depends. The phrase used was "a controlling interest in" and not "the control of the company"; and, as has been pointed out on behalf of the executors, those statutes were concerned with the taxation of the company's profits, and the present case is concerned with the duties payable in respect of an individual's estate. Moreover, in the relevant sections of the Finance Act, 1940, there are provisions which definitely require investigation beyond and outside the mere position on the company's register, and no such provisions are to be found in the statutes dealing with excess profits tax and the other taxing provisions which were the subject of the decisions to which I have been referred.

Under section 55 (5) it is necessary to investigate the true position of the registered shareholder to see whether he is in fact a trustee or occupies some other fiduciary capacity in respect of some other person or persons. Then it is necessary to investigate further for the purposes of section 58 (5) and discover whether the position of the shareholder is or is not due to some disposition made by him. If, therefore, it is permissible to examine the position and duties of the registered shareholder in regard to persons off the register, why is it not right to have regard to the fact that the person having the right to vote is not the absolute owner of the shares but merely one of four trustees, particularly

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when all four are on the register as joint owners? If the investigation is carried this far, it is then apparent that the shareholder in question was not free to cast the votes attached to the shares as a free and unfettered voter but was bound to act only on the unanimous decision of the four registered shareholders. There is no question in the present case about the beneficial interest in the shares. In such circumstances, in my view, the deceased had not control of the company.

An argument was also addressed to me on behalf of the commissioners in regard to the effect of section 55 (3) having regard to the words "shall be deemed to have control," and I was referred to Lord Radcliffe's examination of the uses of such a phrase in *St. Aubyn* v. *Attorney-General*, where he said [19]: "The "word 'deemed' is used a great deal in modern legislation. "Sometimes it is used to impose for the purposes of a statute "an artificial construction of a word or phrase that would not "otherwise prevail. Sometimes it is used to put beyond doubt "a particular construction that might otherwise be uncertain. "Sometimes it is used to give a comprehensive description that "includes what is obvious, what is uncertain, and what is, in "the ordinary sense, impossible." This seems to me to resemble the methods of Humpty Dumpty mentioned by Lord Atkin in *Liversidge* v. *Anderson*.[20]

It was contended in the present case that the intention of subsection (3) was to bring within the phrase "the control of "the company" an artificial construction, and it was also contended that the present case fell within subsection (1) without any recourse to subsection (3) at all. I find it unnecessary, however, to make a choice, because it appears to me that, whatever be the intention of subsection (3), there still remains to be decided what the meaning is of the phrases "the control of "the company" and "the control of powers of voting on all "questions . . ."

In my opinion, for the reasons which I have already given, in the circumstances of this case the deceased had neither the control of the company nor the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon.

Order accordingly.

Solicitors: *Gibson & Weldon for J. & A. Bright, Nottingham; Solicitor of Inland Revenue.*

[19] [1952] A.C. 15, 53; [1951] 2 All E.R. 473.

[20] [1942] A.C. 206, 245; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[COURT OF APPEAL.]

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[1955 W. No. 1371.]

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Nov. 19, 20, 24, 25;
Dec. 18.

Lord Denning, Hodson and Ormerod L.JJ.

Landlord and Tenant—Forfeiture of lease—Repudiation of landlord's title—Action by landlord for possession—General denial of statement of claim in defence—No affirmative setting up of adverse title—Whether general denial creates forfeiture—Defence amended to admit landlord's title before any effective step taken by landlord to claim forfeiture—Effect of amendment.

Practice—Pleadings—Action for possession—General denial—Whether causing forfeiture of lease.

Practice—Pleadings—Amendment—Effect—Retroactive—Amendment of defence to admit landlord's title before any effective step taken by landlord to claim forfeiture—Whether amendment effective to exclude right to forfeiture.

Practice—Pleadings—General traverse—No effective distinction between denial and non-admission—General traverse putting plaintiff to proof.

On April 27, 1955, a landlord issued a writ against two defendants, suing them as the legal personal representatives of the lessee and claiming possession of the demised property—a house with an unexpired term of 40 years—on the grounds of non-payment of rent and breaches of covenant contained in the lease. The statement of claim, inter alia, referred to the lease, set out the title of the landlord (which was a derivative title) and specified the breaches of covenant alleged. On May 27, 1955, judgment in default of appearance was entered against the first defendant. On June 14 the solicitors for the second defendant instructed counsel to draft a defence if only to stay the landlord's hand while efforts were made to remedy the breaches of covenants; and on June 15 a defence, signed by counsel, was delivered on behalf of the second defendant, in which she admitted that she was appointed executrix of the will of the lessee, and denied the alleged breaches of covenant. Paragraph 3 was in the common form of a general traverse as follows:—"Save and except for the admission herein "contained this defendant denies each and every allegation in the "statement of claim as if the same were specifically set out and "traversed seriatim." On June 29 the landlord delivered a reply alleging that by that defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled, and thereby exercised her right, to claim forfeiture of the term. On August 26 the judgment against the first defendant was set aside, and, after an appeal by the landlord, the second defendant was given leave to amend, but not to withdraw, her defence. Thereafter a defence by the first defendant and the amended defence of the second defendant, both of which admitted the lease and the title of the landlord and contained a counterclaim asking for relief from forfeiture under section 146 of the Law of Property Act, 1925, were delivered; but the landlord, by a reply (which contained a counterclaim) claimed possession of the premises on the ground that by reason of the denial of the title in the original defence the term had become forfeited, and contended that there was no jurisdiction to grant relief from the forfeiture resulting from the pleadings:—

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Held, (1) that such a general denial did not involve the affirmative setting up by the tenant of a title adverse to that of his landlord, and was accordingly insufficient to cause a forfeiture.

Per Lord Denning. The landlord's right to claim forfeiture where there had been a disclaimer by matter of record by his tenant died when the feudal system of tenure died and should not now be revived.

Doe d. *Williams and Jeffery* v. *Cooper* (1840) 1 Scott N.R. 36 applied.

Per curiam: A general traverse in a pleading, whether in the form which "denies" or in the form which "does not admit" (between which forms no effective distinction can now be drawn), does no more than put the other party to proof of the allegations denied.

MacLulich v. *MacLulich* [1920] P. 439 distinguished.

(2) (*Per* Hodson and Ormerod L.JJ.) Even if the denial in the original defence created a forfeiture, the landlord did not effectively elect to claim it, either by re-entry or by issue of a writ for possession founded on the forfeiture; for her original reply contained nothing equivalent to the issue of such a writ, and by the date of her final reply which contained a counterclaim for possession, the original defence had been amended to admit the landlord's title; and once pleadings are amended, that which stood before amendment is no longer material before the court. This pleading, albeit in an action by a landlord for possession against a tenant, is no more immutable or irrevocable than any other pleading.

Moore v. *Ullcoats Mining Co. Ltd.* [1908] 1 Ch. 575; 24 T.L.R. 54 applied.

Kisch v. *Hawes Brothers Ltd.* [1935] Ch. 102 overruled.

Decision of Ashworth J. [1958] 1 Q.B. 404; [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314 (No. 2) reversed.

APPEAL from Ashworth J.

By a lease, dated February 23, 1905, a house, No. 18, Park Avenue South, Hornsey, was let by the plaintiff's predecessors in title for a term of 99 years from June 24, 1900, at a yearly rent of £8 8s. The lease contained covenants on the part of the lessee to repair, to paint both the inside and outside of the house, to register with the lessor's solicitors any change resulting from assignment on the death of the lessee or assignee, and to keep the property adequately insured against fire. In 1931 the plaintiff's interest in the house became vested in her and at some date before the year 1947 the term became vested in Mrs. Gertrude Annie Sampson. Mrs. Sampson died on June 23, 1949, having by her will appointed the defendants, Arthur Cecil Sampson and Esther Mary Gandy, her executors and trustees. By clause 4 of her will Mrs. Sampson bequeathed the house to her trustees upon trust to permit the first defendant to use and occupy it or to receive the rents, profits and income thereof, he being responsible for all outgoings and for repairs and for insurance, and after his death in trust for her son and daughter; by clause 5 she directed her trustees to set aside out of the estate a sum of £200 as a fund to meet out of the capital and income thereof the cost of any claim for dilapidations at or near the

expiration of the lease. On February 16, 1950, the will was proved.

For a few years after Mrs. Sampson's death the rent due under the lease was paid, but no payment was made at Michaelmas, 1953 or 1954, or at Lady Day, 1954 or 1955. In January, 1955, the plaintiff served on each of the defendants notice of breaches of covenant. The second defendant, Miss Gandy, was anxious about the position and in fact interviewed the plaintiff's solicitors, but the first defendant, Sampson, would not respond to persuasion or pressure by her and others that he should perform the covenants in the lease. As a result, on April 27, 1955, the plaintiff issued a writ against the defendants, suing them as the legal personal representatives of Mrs. Sampson, and claiming possession of the house, damages, and mesne profits. In her statement of claim the plaintiff referred to the lease, stated that the lessor's interest in and title to the premises were vested in her, and alleged non-payment of rent and breaches of certain of the covenants in the lease. On May 27, 1955, judgment was entered against the first defendant, Sampson, in default of appearance.

On June 14 the solicitors then acting for the second defendant, Miss Gandy, instructed counsel to draft a defence in order to stay the landlord's hand while efforts were made to induce the first defendant to do something to remedy the matter, and counsel duly drafted and signed a defence, which was delivered on June 15, 1955. That defence, by paragraph 1, admitted that the second defendant was appointed an executrix of the will, and by paragraph 2 denied that she had committed any breach of covenant. Paragraph 3 was as follows: "Save and except for "the admission herein contained this defendant denies each and "every allegation in the statement of claim as if the same were "specifically set out and traversed seriatim."

On June 29, 1955, the plaintiff delivered a reply joining issue with the second defendant on her defence, and alleging that "2. By her said defence the second defendant has disclaimed "and disputed the plaintiff's title as her landlord, and the plain-"tiff is thereby entitled to forfeit the same term created by the "said lease referred to in paragraph 2 of the statement of claim. "3. The plaintiff hereby exercises her said right to forfeit the "said term, and claims to be thereby entitled to re-enter upon "the said premises."

On August 26, 1955, an order was made by Master Grundy setting aside the judgment against the first defendant and giving leave to the second defendant to withdraw her defence. The plaintiff appealed, and on October 6 Pearson J. varied the order by giving leave to the second defendant to amend (but not to withdraw) her defence. On February 14, 1956, the defence of the first defendant and the amended defence of the second defendant were delivered, both of which defences, inter alia, admitted the lease and the title of the plaintiff and, having made certain

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other admissions, contained a counterclaim for relief from forfeiture under section 146 of the Law of Property Act, 1925. The plaintiff's reply, dated February 27, 1956, included a counterclaim which alleged that the second defendant by her defence delivered on June 15, 1955, had denied the plaintiff's title "whereby the said term became and is forfeited to the plaintiff "and wherefor the plaintiff claims possession of the said premises "and mesne profits from date of forfeiture."

On November 8, 1956, the plaintiff died and the proceedings were by order continued as between her administratrices and the defendants.

On the trial of the action Ashworth J. held, on December 5, 1957,[1] that the comprehensive denial in paragraph 3 of the second defendant's original defence was a denial of the landlord's title which by operation of law had effected a forfeiture, and that it could not be cured by amendment. In so deciding, the judge applied the decision of Farwell J. in *Kisch* v. *Hawes Brothers Ltd.*[2] on similar facts; and on January 13, 1958, his Lordship held,[3] on an application for relief under the Law of Property Act, 1925, section 146, that as this forfeiture arose by operation of law and not under any proviso or stipulation in the lease within the meaning of section 146, the section had no application, and the defendants were not entitled to ask for relief.

The defendants appealed.

J. H. Hames and *P. S. A. Rossdale* (neither of whom were the counsel who signed the original defence of the second defendant) for the defendants.

L. G. Scarman Q.C. and *Christopher Gibbons* for the landlord.

The following cases were cited in the course of the argument: *Kisch* v. *Hawes Bros. Ltd.*[4]; *Barton* v. *Reed*[5]; *Doe* d. *Ellerbrock* v. *Flynn*[6]; *Dicksey* v. *Spencer* (orse. *Barkhouse's* or *Backhouse's Case*)[7]; *Doe* d. *Williams & Jeffery* v. *Cooper*[8]; *Jones* v. *Mills*[9]; *Wisbech St. Mary Parish Council* v. *Lilley*[10]; *Doe* d. *Graves and Downe* v. *Wells*[11]; *Doe* d. *Lewis* v. *Cawdor*[12]; *Smith* v. *Webster*[13]; *Strauss* v. *Francis*[14]; *Swinfen* v. *Lord Chelmsford*[15]; *Swinfen* v. *Swinfen*[16]; *Neale* v. *Gordon Lennox*[17]; *Shepherd* v. *Robinson*[18]; *Lewis's* v. *Lewis*[19]; *Harvey* v. *Croydon Union Rural*

[1] [1958] 1 Q.B. 404; [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314 (No. 2).
[2] [1935] Ch. 102.
[3] [1958] 1 Q.B. 404.
[4] [1935] Ch. 102.
[5] [1932] 1 Ch. 362.
[6] (1834) 1 Cr.M. & R. 137.
[7] (1587) Moore K.B. 211; Godbolt 105; Gouldsborough 40; Owen 81; 3 Leonard 169; 4 Leonard 3.
[8] (1840) 1 Scott N.R. 36.
[9] (1861) 10 C.B.N.S. 788.
[10] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.
[11] (1839) 10 Ad. & E. 427.
[12] (1834) 1 Cr.M. & R. 398.
[13] (1876) 3 Ch.D. 49.
[14] (1866) L.R. 1 Q.B. 379.
[15] (1860) 5 H. & N. 890.
[16] (1858) 2 De Gex & Jones 381.
[17] [1902] A.C. 465; 18 T.L.R. 791.
[18] [1919] 1 K.B. 474; 35 T.L.R. 220.
[19] (1890) 45 Ch.D. 281.

Sanitary Authority[20]; *Barrow* v. *Isaacs & Son*[21]; *T. M. Fairclough & Sons Ltd.* v. *Berliner*[22]; *Matthews* v. *Munster*[23]; *Gill* v. *Lewis*[24]; *Leek and Moorlands Building Society* v. *Clark*[25]; *Simpson* v. *Gutteridge*[26]; *In re Schar, decd.*[27]; *Midgley* v. *Midgley*[28]; *Elwell* v. *Quash*[29]; *Wood* v. *Richardson*[30]; *Wallace* v. *Daly & Co. Ltd.*[31]; *Eshelby* v. *Federated European Bank Ltd.*[32]; *Philipps* v. *Philipps*[33]; *Hollis* v. *Burton*[34]; *Sneade* v. *Wotherton Barytes and Lead Mining Co.*[35]; *Cargill* v. *Bower*[36]; *Saunders* v. *Freeman*[37]; *Henry Vavasour's Case*[38]; *Sir William Pelham's Case*[39]; *Doe* d. *Bennett* v. *Long*[40]; *Oakley* v. *Lyster*[41]; *Toke* v. *Andrews*[42]; *Renton Gibbs & Co. Ltd.* v. *Neville & Co.*[43]; *Serjeant* v. *Nash, Field & Co.*[44]; *Moore* v. *Ullcoats Mining Co. Ltd.*[45]; *Windle* v. *Barker*[46]; *Lucas* v. *Dixon.*[47]

Cur. adv. vult.

LORD DENNING. The detailed facts of this case are all set out by Ashworth J. in his judgment. They are contained in the Law Reports[1] and I need not repeat them now. Suffice for present purposes to say that the statement of claim recited the original lease, its covenants, and the proviso for re-entry. It alleged a derivative title in the plaintiff saying that the reversion was vested in her by "divers mesne assurances and acts in the "law"; it then alleged a derivative title in the defendants, saying that the term became vested in Gertrude Annie Sampson, and that the defendants were her legal personal representatives. It went on to allege that the defendants had committed breaches of covenant by non-payment of rent, failure to insure, to paint, and to repair. It alleged a notice to remedy breaches and a failure to remedy. It ended with a claim for possession and mesne profits.

The defence of the second defendant admitted that she was the executrix of the will of Gertrude Annie Sampson, denied that

[20] (1883) 26 Ch.D. 249.
[21] [1891] 1 Q.B. 417; 7 T.L.R. 175.
[22] [1931] 1 Ch. 60; 47 T.L.R. 4.
[23] (1887) 20 Q.B.D. 141; 4 T.L.R. 102.
[24] [1956] 2 Q.B. 1; [1956] 2 W.L.R. 962; [1956] 1 All E.R. 844.
[25] [1952] 2 Q.B. 788; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492.
[26] (1816) 1 Mad. 609.
[27] [1951] 1 Ch. 280; 66 T.L.R. (Pt. 2) 1131; [1950] 2 All E.R. 1069.
[28] [1893] 3 Ch. 282.
[29] (1716) 1 Strange 20.
[30] (1840) 4 Beavan 174.
[31] [1949] 1 Ir.Rep. 352.
[32] [1932] 1 K.B. 254.
[33] (1878) 4 Q.B.D. 127.
[34] [1892] 3 Ch. 226.
[35] [1904] 1 K.B. 295; 20 T.L.R. 183.
[36] (1876) 4 Ch.D. 78.
[37] (1562) 2 Dyer 209a.
[38] (1344) Year Book 18 Ed. 3 Trinity Term, p. 28, para. B, Instance 33.
[39] (1590) 16 Rep. 14b; 2 Leonard 60.
[40] (1841) 9 Carrington & Payne 773.
[41] [1931] 1 K.B. 148.
[42] (1882) 8 Q.B.D. 428.
[43] [1900] 2 Q.B. 181.
[44] [1903] 2 K.B. 304; 19 T.L.R. 510.
[45] [1908] 1 Ch. 575; 24 T.L.R. 54.
[46] (1856) 6 E. & B. 675.
[47] (1889) 22 Q.B.D. 357.
[1] [1958] 1 Q.B. 404; [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, 314 (No. 2).

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she had committed the alleged or any breaches of covenant, and then concluded with this general denial, on which the whole case turns: "Save and except for the admission herein contained this "defendant denies each and every allegation in the statement of "claim as if the same were specifically set out and traversed "seriatim."

The judge has held that by putting in that general denial the defendant denied the plaintiff's title, and that thereupon the plaintiff was entitled to claim forfeiture of the lease. As soon as the plaintiff elected to exercise her right, as she did in her reply, the forfeiture was complete, and nothing that the defendant could do to avoid that result would avail her anything. It was incurable by amendment. No relief could be given against it. It was final and irrevocable. So the judge has decided. Yet the rent, we were told, has been paid or is ready to be paid. The repairs done, or almost done. All the breaches will be remedied. Everything made good save for this general denial which, if the judge be right, cannot be cured by art or skill. Strike it out, amend it as it now been amended, but still the effect remains. The rest of this term, with 40 years still to run, valued at over £3,000, is forfeited to the landlord. How must the unfortunate counsel who drafted the defence reproach himself for having brought this on his client! If he had not used the word "denies" but had said "does not admit," there would, it is agreed, have been no forfeiture. But this denial brings with it an inexorable fate from which, if this decision stands, there is no escape.

Since so much effect has been given to this general denial, I would say a word about it. It is used in nearly every defence which goes out from the Temple. It comes at the end. The pleader has earlier gone through many of the allegations in the statement of claim and dealt with them. Some he has admitted. Others he has denied. Whenever he knows there is a serious contest he takes the allegation separately and denies it specifically. But when he has no instructions on a particular allegation, he covers it by a general denial of this kind, so that he can, if need be, put the plaintiff to proof of it at the trial. At one time the use of this general denial was said to be embarrassing: see *British and Colonial Land Association Ltd.* v. *Foster and Robins* [2] but since 1893 it has been recognized as convenient and permissible: see *Adkins* v. *North Metropolitan Tramways Co.*[3] Sometimes the pleader "denies," sometimes he "does not "admit" each and every allegation; but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded "as if it were specifically set out and traversed seriatim." In short, it is a traverse, no more and no less. Now the effect of a traverse has been known to generations of pleaders. It "casts upon the plaintiff the burden of proving the allegations "denied": see Bullen and Leake on Precedents, (3rd ed., p.

[2] (1888) 4 T.L.R. 574. [3] (1893) 10 T.L.R. 173.

436). So this general denial does no more than put the plaintiff to proof. Mr. Scarman did suggest at one stage that it might indirectly involve a positive averment. For instance, he said that, if pleaded in a libel action, it would involve a denial that the words were false and hence it would carry the implication that they were true and would amount to a plea of justification. But he did not pursue this illustration, and I think it clearly untenable. There are some denials which do involve an affirmative allegation (see *MacLulich* v. *MacLulich* [4]); but not this general denial. It only puts the plaintiff to proof.

The effect of this general denial, in an action to recover land, is therefore the same as the classic plea: "The defendant is in "possession." This plea of possession was good against everyone except against a plaintiff who could show a better title. It put the plaintiff to proof of his title as much as if the defendant had expressly denied, or had expressly stated that he did not admit, the whole and every one of the allegations contained in the plaintiff's pleading: see *Danford* v. *McAnulty*.[5] In my junior days I often put in this plea of "possession," and I should have been shocked to find that I had thereby involved my client in a forfeiture. Yet that was the result of such a plea if a decision of Farwell J. in 1935 was right. He held, in *Kisch* v. *Hawes Brothers Ltd.*[6] that a plea of "possession" was a cause of forfeiture on the ground that it amounted to a denial of the plaintiff's title, and that a denial of the plaintiff's title was a ground on which a lessor was entitled to claim forfeiture of the lease: and that, as soon as the plaintiff delivered a reply claiming the right to re-enter on that ground, there was a forfeiture, irrevocable and incurable by amendment, and enforceable in those very proceedings, although the cause of forfeiture only arose after the date of the writ.

In the present case the judge has followed *Kisch* v. *Hawes Brothers Ltd.*,[6] as no doubt he felt he ought to do; but we have been invited to overrule it, and for this purpose we have been taken back to the old books on forfeiture by matter of record.

The history starts in feudal times. When a lord allotted a feud or fee to a tenant there was a condition annexed to it that the tenant should do service faithfully to him by whom the lands were given: for which purpose the tenant took an oath of fealty; and in case of breach of this condition and oath the lands reverted to the lord who granted them. If the tenant did anything tending to impair the title of his lord to the lands it was a breach of his oath of fealty and gave rise to a forfeiture. This is well seen by a reference to Glanville, who was Chief Justice in the reign of Henry II. In his treatise composed about 1181 A.D. he says (Book IX, Ch. 1, p. 68) that "no one can by law, consistently "with the Faith implied in Homage, do anything which tends to

[4] [1920] P. 439.
[5] (1883) 8 App.Cas. 456.
[6] [1935] Ch. 102.

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"deprive his Lord of his Inheritance or to affix a personal stain "upon him . . . if a tenant should do anything to the dis-"inherison of his Lord, and should be convicted of it, he and his "heirs shall for ever lose the fee held of such Lord."

Among the acts which tended to the disinherison of the lord, the most important for present purposes was a *disclaimer* by the tenant by matter of record. This was a denial by the tenant in a court of record of his lord's title. It commonly arose in this way. If a tenant failed to perform the services due to his lord, the lord used to take action to recover them. The usual thing he did was to take the tenant's cattle by way of distress so as to compel the tenant to perform the services. In order to regain the cattle, the tenant would bring replevin in the Court of Common Pleas (a court of record) and, when the lord avowed for services in arrear, the tenant would enter a disclaimer in these words: "*He doth not hold of the said Lord the land afore-"said but the same to hold of the said Lord altogether disavows "and disclaims.*" This disclaimer was a very powerful weapon in the hands of the tenant, for by it the lord was barred of all possessory remedies for the services. The result was that, although the distress and avowry of the lord were lawful, yet the tenant would regain and retain his cattle and recover damages from the lord. It tended, therefore, greatly to the prejudice of the lord. But the lord could have his revenge, provided always that he could prove his title. By bringing a writ of right on the disclaimer, he could claim forfeiture of the tenant's interest altogether. This is all explained by Finch in his Treatise on the Common Laws, pp. 268–9. He says that "The Lord shall have "a writ of right upon this disclaimer, and if he can prove that "the land is holden of him, he shall recover the land itself for "ever, *because the disclaimer is of record.*"

I have dealt thus much with disclaimer because it is the only instance I have found in the old law in which a denial on the record of the landlord's title by itself gave rise to a forfeiture. But the reasons for it are, as Blackstone says, "most apparently "feodal" (see Blackstone, Commentaries, 8th ed., Vol. 2, p. 275): and when the feudal tenures died out, the law on the subject died too. Never since feudal times has a denial of title by itself given rise to a forfeiture until *Kisch* v. *Hawes Brothers Ltd.*[6] in 1935.

There are many other instances in the old books of acts which tend to the disinherison of the lord, but in all of them you will find that the tenant is acting contrary to the faith which he owes to his lord. He is not defending the reversion as he ought to do. He is claiming the fee simple to be in himself or in another, and not in the lord. If he claims it on the record of the court, it is a cause of forfeiture. Thus if a writ of right was brought against a tenant for life and he took it upon himself in his pleadings

[6] [1935] Ch. 102.

"to join the mise upon the mere right" (which means that he put it in issue who hath the best or clearest right: see Termes de la Ley, pp. 442–3), that amounted to a claim on the record that he himself was entitled to the fee simple, and on being proved it gave rise to a forfeiture: see Coke upon Littleton (pp. 251b, 252a). Or if the tenant allowed a stranger to recover the land by not taking the trouble to defend the case, or by making default in pleading, or by pleading "feintly," i.e., covinously in collusion with the stranger, this was a cause of forfeiture. On the contrary, if the tenant had acted in good faith towards his lord and had done nothing to allow the stranger to win but "loses by "discretion of the court on a mispleading," there was no forfeiture. This appears from a case in 1344 on a writ of entry against *Henry Vavasour.*[7] It is reported in the Year Book of 18 Edward III, No. 33 (which will be found with a translation in the official reprint published by H.M. Stationery Office, p. 366).

These rules were afterwards extended to include not only tenants for life, but also tenants for years. There are a number of cases which show that if a tenant for years, on the face of the record, claimed the freehold for himself, that was a ground on which the reversioner could forfeit the lease. The point used to arise in this way: the original lessor sold his reversion to a purchaser and assigned the property to him. The purchaser then called upon the tenant to attorn to him and to pay rent. Instead of doing so, the tenant resisted the demand and claimed for one reason or other that he was himself entitled to the freehold. If that issue was tried out and decided against the tenant, the reversioner was entitled to claim forfeiture of the lease: but in order to do so he had to bring a fresh action to recover possession: see *Plesington's* case [8] and *Saunders* v. *Freeman.*[9] In 1587 there was an exceptional case of this kind which deserves special mention. It is reported as *Dicksey* [or *Dicksee* or *Dixe*] v. *Spencer* [10] in some places and as *Barkhouse's* case [10] in another. Barkhouse let premises to Spencer for a term of years. Barkhouse afterwards sold the reversion to Dicksey. Dicksey sued Spencer for rent. Spencer pleaded that he had bought the reversion from Barkhouse before Dicksey bought it. Dicksey did not wait for the issue to be tried out but re-entered at once on the ground that by this plea the tenant Spencer had forfeited the lease. Was this re-entry lawful? The question was much debated in the various courts. It first came up in the Court of Hustings at the Guildhall, where it was referred for the opinion of the Court of Common Pleas [sub nom. *Wolstan Dixe's* case].[10] When it came before the Common Pleas, two judges at first held that there was no forfeiture,[11] but three judges later held that there

[7] (1344) Year Book 18 Ed. 3, Trinity Term, p. 28, para. B, Instance 33.

[8] (1393) Fitzherbert's Abridgement Title Quid Juris Clamat, 20.

[9] (1562) 1 Plowden 209; 2 Dyer 209a.

[10] (1587) Moore K.B. 211–212.

[11] (1587) Godbolt 105.

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was a forfeiture.[12] When it got back to the Hustings the court there refused to abide by the opinion of the three judges and held that there was no forfeiture. Dicksey thereupon brought a writ of error before the special commission of three judges which heard appeals from the Hustings. These seem to have been of opinion that there was a forfeiture, but it is reported that "after many "arguments, the said justices moved the parties to a friendly "course, to compound the matter."[13] The issue was thus left undetermined. The case can hardly be considered as of much authority. It only shows that the judges of that time got into difficulties just as we do.

The latest case on this medieval law was in 1590, *Sir William Pelham's* case[14] which was argued by Sir Edward Coke himself when he was counsel. He did a great deal of research and cited many cases from the Year Books. He made the results of all this learning available to the profession at large when he came to write his commentary upon Littleton. He there says (Vol. 2, p. 251b) that forfeiture *by matter of record* may be made by a particular tenant by "three manner of ways. First by alienation. "Secondly, by claiming a greater estate than he ought. "Thirdly, by affirming the reversion or remainder to be in a "stranger." He gives instances of these three ways. Throughout his discourse it is plain that a disclaimer by a tenant in a court of record does not give rise to a forfeiture unless it amounts, expressly or impliedly, to an assertion or affirmance by the tenant of title in himself or in a stranger. His analysis of the law on the subject has been accepted by all who have followed him, notably Sir John Comyns C.B. in his Digest (4th ed., Vol. 4) Forfeiture (A.2, A.4., A.5.), and Sir William Blackstone in his Commentaries (8th ed., Vol. 2, pp. 275–6). I am sure that Matthew Bacon in his Abridgement meant to say nothing to the contrary.

So ends the medieval law as to forfeiture by matter of record. Thenceforward it seems to have fallen into disuse for over 300 years. There is no case, so far as I know, in which it has been applied between *Pelham's* case[14] in 1590 and *Kisch* v. *Hawes Brothers Ltd.*[15] in 1935. There is mention of it once or twice as, for instance, in *Doe* d. *Groves and Downe* v. *Wells*[16] where it was held that a disclaimer (not of record) does not work a forfeiture; but otherwise it has been out of sight and out of mind. It is a pity that it was not left in oblivion, for it is quite inappropriate at the present day. All the circumstances which gave rise to this medieval law have now disappeared; and with their passing the old law has gone too. A tenant for years does not owe homage to his landlord. He does not take an oath of fealty. He is under no duty to defend the interest of the

[12] (1587) Gouldsborough 40; Owen 81; 4 Leonard 3.
[13] (1587) 3 Leonard 169, 170.
[14] (1590) 16 Rep. 14b; 2 Leonard 60.
[15] [1935] Ch. 102.
[16] (1839) 10 Ad. & E. 427.

reversioner. His rights and duties are defined by the lease; and there is no room for any implied condition that he is not to dispute the landlord's title, either on the record or off it. The landlord is sufficiently protected by the rule that the tenant is estopped from denying his landlord's title. This rule ensures that no denial of title is of any avail to the tenant except in those cases where he may properly put the landlord to proof. To go further and say that the denial involves a forfeiture would be a punishment on the tenant which cannot be justified. This form of pleading does the landlord no harm, and the tenant should not suffer by reason of it. When these old feudal rules are brought up to exact a penalty for an innocent plea of this kind, I call to mind the words of Lord Atkin in *United Australia Ltd.* v. *Barclays Bank Ltd.*[17]: "When these ghosts of the past stand in "the path of justice clanking their medieval chains the proper "course for the judge is to pass through them undeterred." That spiritual advice, if I may so describe it, was given on a like occasion when it was sought to deprive a man of his rights because of his form of pleading. The House of Lords did not permit him to be trapped there by the old rules. Nor should we here. I have no hesitation in holding that a denial in a pleading of the landlord's title does not today give rise to a forfeiture. In so far as *Kisch* v. *Hawes Brothers Ltd.*[18] held that it did, it was wrong and should be overruled.

I would only add that, if the medieval law were to be revived, it would not, on a proper understanding of it, enable the landlord to claim forfeiture of the lease. This general denial only puts the landlord to proof. It does not affirm the fee to be in the defendant or in a stranger. If it were by some mischance to be so construed, it would be a "mispleader" which would not cause a forfeiture. Moreover, a defendant in the old days was not bound by the words of his professional pleader unless he had expressly or tacitly adopted them: see Pollock and Maitland (2nd ed., Vol. 1, p. 212); and this would apply especially in a case where the pleading might give rise to a forfeiture: see Finch, Treatise on the Common Laws (p. 266). In this case again there was no re-entry or its equivalent; and in any case the plea has been amended. I do not stay, however, to consider these matters; nor any of the law relating to forfeiture by acts in pais, nor those cases where a tenant from year to year by his conduct has waived the necessity for a notice to quit. Suffice it to say that in my opinion a denial in a pleading by a tenant of his landlord's title does not today give rise to forfeiture.

I would therefore allow this appeal and remit the case for hearing on the other issues.

[17] [1941] A.C. 1, 29; 57 T.L.R. 13; [1940] 4 All E.R. 420.

[18] [1935] Ch. 102.

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HODSON L.J. This was an action for possession brought by a landlord against the two personal representatives of the lessee on the grounds of non-payment of rent and breaches of covenants contained in the lease. Judgment was entered against the first defendant in default of appearance. The second defendant entered a defence (which was subsequently amended) containing this paragraph: "Save and except for the admission "herein contained this defendant denies each and every allega- "tion in the statement of claim as if the same were specifically "set out and traversed seriatim." The defence as originally drawn contained no counterclaim for relief against forfeiture. By her reply the landlord claimed that by her defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled and thereby exercised her right to forfeit the term. The judge, applying the decision of Farwell J. in *Kisch* v. *Hawes Brothers Ltd.*,[18] gave judgment for the plaintiff, not on the grounds claimed in the writ, but on the ground of forfeiture as claimed in the reply.

This case cannot be distinguished in any way favourable to the defendants from *Kisch* v. *Hawes Brothers Ltd.*[18] There the landlord followed the course which has been taken here, namely, he took the point in reply to the defence that by their defence the defendants had denied the plaintiff's title and that a denial of the plaintiff's title by a tenant is a ground upon which a lessor is entitled to claim forfeiture of the lease.

It should be noted that in *Kisch's* case [18] the effect of the defence was derived from consideration of Order 21, rule 21, which by its then terms introduced into the pleading a statement that the defendant denies or does not admit the allegations of the statement of claim. In argument, an earlier case, *Barton* v. *Reed*,[19] was referred to, in which the point was taken, but not decided, that a defendant forfeited his lease by pleading a denial of his landlord's title. Mr. Scarman for the plaintiff has not sought to uphold *Kisch's* case [20] on the basis that failure to admit title creates a forfeiture, for he concedes that at least when there is a derivative title, as there was in that case as well as in this, a defendant is entitled to put to proof or not to admit title without imperilling his lease: see *Jones* v. *Mills*,[21] and *Doe* d. *Lewis* v. *Cawdor*.[22] He, however, has contended that in this case the defendant has gone beyond non-admission and the mere putting to proof by setting up a denial in clear and unambiguous terms which entitles the landlord to claim a forfeiture of the lease.

The legal principle involved goes back to feudal times and is stated as follows in Bacon's Abridgement (7th ed., Vol. 3, p. 196): "Another way of forfeiture in a court of record is,

[18] [1935] Ch. 102.
[19] [1932] 1 Ch. 362.
[20] [1935] Ch. 102.
[21] (1861) 10 C.B.N.S. 788.
[22] (1834) 1 Cr.M. & R. 398.

"by claiming a greater estate than he had by the feudal dona-"tion, or by affirming the reversion to be in any other person "than his lord. This seems to be grounded on a rule in the "old feudal law, that if a vassal denied that he held the feud "of his lord, and it was proved against him, such denial was "a forfeiture." Examples are to be found in the books of denial by record involving the setting up of an adverse title: compare *Dicksey and Spencer's* case,[23] where the lessee for years, in an action of debt brought against him for the rent reserved, claimed fee by bargain and sale of his lessor, the which bargain and sale the plaintiff traversed. "All the three judges "were clearly of opinion that, notwithstanding the traverse, it "is a forfeiture; for the very claim is a forfeiture which "cannot be saved by matter subsequent."[23] The same case appears to be reported under the name *Barkhouse*,[24] where it is recorded: "Debt against lessee for years for rent: the defen-"dant claimed fee in the land whereas he had no fee: it was "resolved that it was a forfeiture." The principle is later stated in clear language in *Doe* d. *Williams and Jeffery* v. *Cooper*.[25] Tindal C.J. said[26]: "To constitute a disclaimer, "there must be a renunciation by the party of his character of "tenant, either by setting up the title of a rival claimant, or "by asserting a claim of ownership in himself." Coltman J. in the same case said[27]: "A disclaimer I understand to be "the setting up of a title that is inconsistent with the title "of the landlord"; and he ended his judgment by saying: "I think the jury were well warranted in concluding that the "defendant had no intention to deny the right of the lessors "of the plaintiff, but merely desired to secure himself from "liability to be called upon again by Kent." The other members of the court gave judgment to the same effect.

On the construction of the defence, I agree with the judge that the words of paragraph 3, which I have quoted above, are clear and specific. There is here a denial which, if today there is any validity in the distinction between denial and putting to proof, goes beyond the non-admission to be found in *Kisch's* case.[28] The question still remains whether this denial involves the affirmative setting up of an adverse title to be found in the authorities. Mr. Scarman contends that this must be so, for to deny is equivalent to the assertion of the opposite and must of necessity involve the tenant in asserting a title in himself or a stranger. While conceding that there may be cases where, as a matter of construction, a denial may in a pleading be pregnant with an affirmative allegation (compare *MacLulich* v. *MacLulich*[29]) I do not think that this is such a case. Bearing in mind that the courts lean against forfeiture,

[23] (1587) 3 Leonard 169, 170.
[24] (1587) 4 Leonard 3.
[25] (1840) 1 Scott N.R. 36.
[26] Ibid. 41.
[27] Ibid. 43.
[28] [1935] Ch. 102.
[29] [1920] P. 439.

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I think it is wrong to read into the general denial contained in the paragraph of the defence which I have read an affirmative allegation of the kind supposed by the judges who formed the court in *Doe* d. *Williams and Jeffery* v. *Cooper*.[30]

In my opinion at the present time, although the practice of pleaders may vary, there is no effective line to be drawn between non-admission, on the one hand, and denial on the other. Certainly a general traverse of the kind used in the defence here should not be taken against the defendant as going beyond a putting to proof and ought not to be taken to involve an affirmative contradictory allegation that the title in the land was in himself or in a stranger. Indeed, on the form of pleading it would not be legitimate for him to give evidence to that effect.

This conclusion is enough to dispose of the appeal in favour of the defendant, for, if the pleader did not destroy his client's term by his denial, there is no forfeiture. I should add that, as the judge pointed out, the pleader in question was not the counsel now engaged in the case on behalf of the defendant.

If I am wrong in saying that the defence created no forfeiture, the question remains whether the landlord has effectively elected to claim the forfeiture. I have said that the plaintiff followed the line taken in *Kisch's* case[31] by taking the point in his reply that there was a forfeiture and electing by that reply to accept the forfeiture so created.

Again Mr. Scarman does not seek to support *Kisch's* case[31] in this respect, for he recognizes that to make his election the landlord must either re-enter or issue a writ of possession, or take some equivalent step in order to make his election, and he does not contend that the reply in its original form would have any greater effect than a notice of intention to re-enter, which would be insufficient. The position is fully stated by Warrington J. in *Moore* v. *Ullcoats Mining Co. Ltd.*[32] He said[33]: "I am of opinion upon the authorities—and I refer "particularly to *Jones* v. *Carter*[34] and to a dictum of Bayley J. "in *Fenn* v. *Smart*[35]—that where the condition in the lease "is that the landlord may re-enter he must actually re-enter, "or he must do that which is in law equivalent to re-entry, "namely, commence an action for the purpose of obtaining "possession. Parke B. in *Jones* v. *Carter*[36] puts that quite "plainly. In the particular case to which he was referring the "proviso for re-entry was in a different form to that in the "present case—a form which one sometimes finds, namely, "that upon breach the lease shall be determined. What he "says is this: 'An entry, or ejectment, in which an entry is

[30] 1 Scott N.R. 36.
[31] [1935] 1 Ch. 102.
[32] [1908] 1 Ch. 575; 24 T.L.R. 54.
[33] [1908] 1 Ch. 575, 587.
[34] (1846) 15 M. & W. 718, 725.
[35] (1810) 12 East 444, 448.
[36] 15 M. & W. 718, 725.

"'admitted'—that is, having reference to the old form of pro-
"cedure—'would be necessary in the case of a freehold lease,
"'or of a chattel interest, where the terms of the lease
"'provided that it should be avoided by re-entry. Whether
"'any other act unequivocally indicating the intention of the
"'lessor would be sufficient to determine this lease'—that is,
"the lease in the form of one with which he was dealing—
"'which is made *void* at the option of the lessor, we need
"'not determine, because an ejectment was brought, and pro-
"'ceeded with to the consent-rule, by which the defendant
"'admitted an entry, and the entry would certainly be an
"'exercise of the option.' In *Fenn* v. *Smart*[37] Bayley J.—
"although it is only a dictum in the course of the argument,
"but it shows the view he took—said: 'Must not the necessity
"'of an entry depend upon the wording of the condition? If
"'the words be, that upon the doing of such an act, the
"'reversioner may enter, there must be an entry to avoid the
"'estate; but if the estate be granted upon condition that if
"'the grantee do such an act, the estate shall thereupon im-
"'mediately cease and determine, there no entry is necessary.'
"He there draws a distinction between the two classes of cases.
"In my opinion the present case falls within the first class,
"and I do not see how it is possible, on any construction of
"this proviso for re-entry, to say that the lessors have re-entered,
"when all that they have done is to give a notice of their in-
"tention to re-enter, founded on a statement that the lease had
"determined, which had not in fact happened, or a demand for
"possession founded on that notice." The plaintiff not having re-entered or issued a writ of possession founded on the forfeiture relied on was not in a position to obtain judgment for possession in that action.

Mr. Scarman has argued, however, that in this case the plaintiff has, although he has not issued a writ of possession, done the equivalent in his reply to the amended defence which, since it contained a counterclaim, entitled him by way of counterclaim to the counterclaim to raise the question to save multiplicity of actions. I am not persuaded that as a matter of procedure this step is effective; but the point is of little more than academic interest since, if Mr. Scarman is right, the landlord can still claim the forfeiture by issuing a writ of possession if the defendant has by his plea given rise to a forfeiture. There is, however, I think in this case a fatal objection to the plaintiff's claim since, as in *Kisch's* case,[38] the defence was amended before trial, so that the denial of title was struck out and the action came to trial without it. Moreover, the defence was amended before the reply claiming forfeiture, on which the plaintiff now relies, came into existence. I do not think that this amendment can be ignored. Once pleadings are amended,

[37] 12 East 444, 448.

[38] [1935] Ch. 102.

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what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order; and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties: see *Sneade* v. *Wotherton Barytes and Lead Mining Co.*,[39] where Lord Collins said[40]: "It appears to "me that the writ as amended becomes for this purpose the "original commencement of the action."

A somewhat similar situation arose in *Wallace* v. *Daly & Co. Ltd.*,[41] a case decided by the Supreme Court of Ireland, to which we were referred. Two members of the court, who formed part of a majority in a court of five, were of this opinion, although counsel had by agreement abstained from taking the point that the forfeiture had been cured by amendment. To this Mr. Scarman replies that, although the position as to amendment is, generally speaking, as I have stated it, yet here the pleading as originally drawn had an irrevocable effect which could not be cured by amendment, since it was a breach of the condition under which the defendant held his lease. He relied on the position as stated in Bacon's Abridgement (7th ed., vol. 4, at p. 884): "Here it is to be observed, that any act of the lessee, by which "he disaffirms or impugns the title of his lessor, occasions a "forfeiture of the lease. For to every lease the law tacitly "annexeth a condition, that if the lessee do any thing that may "impair the interest of his lessor, the lease shall be void, and "the lessor may re-enter. Indeed, every such act necessarily "determines the relation of landlord and tenant; since to claim "under another and at the same time to contravert his title, to "hold under a lease, and at the same time to destroy the interest "out of which the lease ariseth, would be the most palpable in-"consistency." It is said that, the condition having been broken, this cannot be cured by amendment, even though the breach of condition is contained in a pleading which normally is capable of amendment. I cannot accept that this pleading should be regarded as any more immutable than any other pleading, and, accordingly, if it were necessary, would hold that the appeal should succeed on the ground that before the landlord had re-entered or taken effective proceedings for re-entry the defendant by amending his defence had removed from it the denial of title which it had previously contained.

The position as to *Kisch* v. *Hawes Brothers Ltd.*[42] seems to be as follows: The decision itself cannot be supported since (1) there was no denial of the landlord's title; (2) there was no election by the landlord to take advantage of the forfeiture in the manner

[39] [1904] 1 K.B. 295; 20 T.L.R. 183.
[40] [1904] 1 K.B. 295, 297.
[41] [1949] Ir.Rep. 352.
[42] [1935] Ch. 102.

required by law; (3) judgment was delivered against the tenant although leave had been given to amend the pleading so as to remove that part which was said to have caused the forfeiture. The landlord cannot succeed independently of *Kisch* v. *Hawes Brothers Ltd.*[42] since (1) the mere denial of title in the defence is insufficient to cause a forfeiture; (2) by her amended counterclaim in the action the landlord has not effectively taken advantage of the forfeiture; (3) the defence was amended before the judgment was given so as to remove in this case also the part of the pleading which was said to have caused the forfeiture.

I would allow the appeal and remit the case for hearing on the other issues raised in the action.

ORMEROD L.J. The fundamental question in this appeal is whether the landlord can regard the general traverse contained in the defence of Miss Gandy as a disclaimer of her title so as to be entitled to re-enter the premises.

Mr. Scarman, on behalf of the landlord, agreed that the insertion of the paragraph in question was a lapse on the part of counsel. Nevertheless, the landlord has sought to take advantage of this lapse, which, of course, she is entitled to do, whatever be the merits of the case, if there has been such a disclaimer of the landlord's title as to entitle her to claim forfeiture of the lease. As has been pointed out in the judgments which have already been delivered, the rule that the setting up of a title adverse to that of the lessor may involve the lessee in the forfeiture of his lease has its origin in the old feudal law. The question has been considered recently by this court in *Wisbech* v. *St. Mary Parish Council* v. *Lilley*,[43] when Lord Evershed M.R.[44] cited a passage from the judgment of Lord Lyndhurst C.B. in *Doe* d. *Ellerbrock* v. *Flynn*[45] as follows: "I think that the jury, upon the facts "proved at the trial, came to a right conclusion. If the tenant "sets up a title hostile to that of his landlord, it is a forfeiture "of his term: and it is the same if he assists another person to "set up such a claim. Whether he does the act himself, or only "colludes with another to do it, it is equally a forfeiture." Lord Evershed M.R. then went on to say[46]: "Of course, the concep-"tion of the relation of landlord and tenant has undergone many "changes since that case was decided in 1834. The rule asserted "was founded upon the feudal law, as counsel in the case pointed "out. Still, if the facts were strictly brought within the scope "of the decision in *Doe* d. *Ellerbrock* v. *Flynn*[47] I do not doubt "that even today the court would follow it." Romer L.J. said[48]: "I accept Mr. Bridges' submission that even now, if a "tenant does in fact deliberately assert a title in himself adverse "to his landlord, or if he lets a stranger into possession with the

[43] [1956] 1 W.L.R. 121; [1956] 1 All E.R. 301.
[44] [1956] 1 W.L.R. 121, 124.
[45] (1834) 1 Cr.M. & R. 137.
[46] [1956] 1 W.L.R. 121, 124.
[47] 1 Cr.M. & R. 137.
[48] [1956] 1 W.L.R. 121, 126.

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"intention of enabling him to set up a title adverse to the land-"lord, then that amounts to a repudiation of the landlord's "title."

We were referred to numerous authorities, many of them very old, but it seemed to me that *Doe* d. *Williams and Jeffery* v. *Cooper*[49] stated the position clearly, when Tindal C.J. said[50]: "To constitute a disclaimer, there must be a renunciation by the "party of his character of tenant, either by setting up the title "of a rival claimant, or by asserting a claim of ownership in "himself." Did the defendants, by reason of the general traverse contained in the defence of one of them, renounce their character as tenant by setting up the title of a rival claimant, or asserting a claim of ownership in themselves or one of them? The statement of claim set out the landlord's title to the reversion. The title was a derivative one. This averment of title was therefore one of the matters which was dealt with in the general traverse, since there was no other mention of it in the defence. It was argued on behalf of the defendants that the effect of the traverse was to do no more than to put the landlord to proof of her title. For the landlord it was argued that it went much further than that. If the words in the paragraph, instead of being a denial, had read: "This defendant does not admit," and so on, then, says the landlord, there would have been no cause for complaint, but in fact there was a denial of the landlord's title, and that amounts to a disclaimer. I am bound to say that for my part I cannot accept this contention. The methods of pleaders vary, but the use of a general traverse in one form or another is very common indeed. Some pleaders, if they wish to go no further than to put the plaintiff to the proof of the matters averred in the statement of claim, will use the form "The defendants do not admit." Others will say: "The defendants deny." Having regard to the modern practice of pleaders, I have always regarded the two forms as having a similar effect, and, indeed, it is difficult to see what other effect in the ordinary case a denial could have than putting the plaintiff to proof, unless the defence also contained some positive averments. If this be the effect of a general traverse such as the one under consideration here—and for my part I think it is—then the pleading cannot amount to a renunciation by the defendants of their character as tenant.

The judge [Ashworth J.] clearly considered that he should follow the decision of Farwell J. in *Kisch* v. *Hawes Brothers Ltd.*,[51] and he said[52]: "In my judgment, the denial of the "lessor's title contained in paragraph 3 is in clearer and more "direct form than the denial held in *Kisch* v. *Hawes Brothers* "*Ltd.*[53] to be involved in the plea that the defendants were in "possession." It was pleaded in the defence in that case, where the defendants were being sued for possession of some premises in

[49] 1 Scott N.R. 36.
[50] Ibid. 41.
[51] [1935] Ch. 102.
[52] [1958] 1 Q.B. 404, 416.
[53] [1935] Ch. 102.

Notting Hill Gate, that the defendants were in possession of the premises. By Order 21, r. 21, in its then form, it was provided as follows: "No defendant in an action for the recovery of land who "is in possession by himself or his tenant need plead his title, "unless his defence depends upon an equitable estate or right, "or he claims relief upon any equitable ground against any right "or title asserted by the plaintiff. But, except in the cases "hereinbefore mentioned, it shall be sufficient to state by way "of defence that he is so in possession, and it shall be taken to "be implied in such statement that he denies, or does not admit, "the allegations of fact contained in the plaintiff's statement of "claim. He may nevertheless rely upon any ground of defence "which he can prove except as hereinbefore mentioned." The plaintiff submitted that she was entitled to re-enter on the ground that the said plea amounted to a denial of the plaintiff's title, and that a denial of the plaintiff's title by a tenant was a ground for forfeiture of the lease. Farwell J. accepted this contention and held that the plaintiff was entitled to possession of the property. It follows from what I have said above that, in my view, this decision cannot be regarded as good law. The plea that the defendant was in possession of the premises did nothing more than put the plaintiff to proof of her title. It made no attempt to set up an adverse title either in the defendant himself or in anyone else. It would, indeed, cause great hardship to lessees if a plea such as the one we are considering in this case were to render a lease liable to forfeiture. Such a plea cannot do the landlord any harm, nor can it put him in any worse position than he was in before. He is simply put to the proof of his title.

But even if the true construction of the paragraph of the defence in question should be that it does amount to a renunciation by the defendants of their character as tenants, the landlord would still, in my judgment, not be entitled to succeed. The statement of claim was delivered with the writ which was issued on April 27, 1955. The first defendant, Sampson, allowed judgment to go by default, but the defence of the second defendant, Miss Gandy, was delivered on June 15, 1955. The landlord delivered her reply on June 29, 1955, paragraph 3 of which was as follows: "The plaintiff hereby exercises her said right to "forfeit the said term, and claims to be thereby entitled to "re-enter upon the said premises." Nothing was done at that time to complete the re-entry, and Mr. Scarman agreed that the paragraph in the reply without the issue of a writ would be insufficient for the purpose. The judgment obtained against Sampson was ultimately set aside, and on February 14, 1956, an amended defence was delivered on behalf of Miss Gandy, admitting the lease and the landlord's title, and counterclaiming for relief against forfeiture; and on February 27, 1956, the landlord delivered a reply claiming possession of the premises on the ground that by reason of the denial of the title in the original defence the term had become forfeited. Mr. Scarman argued

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that the landlord acquired the right to forfeit when the defence was delivered in its original form, and no amount of amendment could deprive her of that right. This is a proposition that I find some difficulty in following. The defence in question is a pleading which is capable of amendment like any other pleading. Once it is amended, it takes its place on the record as a part of the pleadings setting out the issues upon which the action will be tried. When the amended defence was delivered, nothing had been done by the landlord to claim possession of the premises. Had a writ claiming possession been issued before the amendment the position might have been different. This was not done, and when a claim was made the position on the record was that the landlord's title was admitted. I agree that the appeal should be allowed.

Appeal allowed.
Case remitted for further hearing to Ashworth J.

Solicitors: *Wilders & Sorrell; Murray, Hutchins & Co.*

M. M. H.

[PROBATE, ETC., DIVISION.]

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Oct. 6, 7; *Nov.* 24; *Dec.* 11.
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Husband and Wife—Divorce—Foreign decree—Conflict of jurisdiction—Foreign decree recognized by court of wife's "ordinary residence"—Decree obtained outside the jurisdiction of that court—Parties domiciled in England—Whether decree recognized in England—Collusion—Effect—"Ordinary residence"—Whether determined by founding proceedings on residence in other State—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 18 (1) (*a*) (*b*).

Husband and Wife—Collusion—Foreign decree—Effect on.

Residence—Divorce—"Ordinary residence"—Whether determined by founding proceedings on residence in other State.

A husband and wife were married in 1950 in the United States of America, and they lived together in New York City. The husband retained throughout his English domicile of origin. In December, 1952, he returned to England, and he alleged that the wife refused to follow him. Shortly before he left, he was served with a summons in the Supreme Court of New York issued on behalf of the wife, who there instituted an action for divorce or alternatively separation. Interlocutory orders were made in that action; but proceedings for divorce were later instituted in the State of Chihuahua, Mexico, by the wife after negotiations to that end between the parties through their lawyers. On May 21, 1954, the wife filed a petition for divorce in the Mexican court, alleging incompatibility of temperament, and a decree of dissolution was pronounced the following day. The wife was present at the hearing and the husband was represented. The New York action was discontinued by consent on June 7, 1954.

The jurisdiction of the Mexican court was based on two grounds: (a) that the wife was resident within that jurisdiction, her physical presence at the moment of the granting of a certificate to that effect being sufficient, and (b) that both parties had expressly submitted to the jurisdiction. Either ground would have been of itself sufficient.

Expert evidence was accepted that the decree of the Mexican court would be recognized without question in the State of New York, even though divorce proceedings were pending there at the time; and that as a result of that decree the wife thereafter would unquestionably be held in that State to be a single woman.

Apart from her brief visit to Mexico, the wife was ordinarily resident in the State of New York from the marriage in 1950 to the date of the present proceedings.

The husband prayed the court for a declaration that his marriage had been validly dissolved by the Mexican decree, the basis of his submission being as follows: (a) the New York court was the court of the residence of the wife and she had been more than three years ordinarily resident within its jurisdiction; (b) the New York court would recognize the Mexican decree; (c) the English court would under *Armitage* v. *Attorney-General* [1906] P. 135; 22 T.L.R. 306, recognize the validity of a decree pronounced alibi if such a decree was recognized as valid by the court of the domicile; (d) as a result of recent decisions, the English courts may now recognize foreign decrees pronounced at the suit of a wife if the wife at the time of the presentation of her petition had been three years ordinarily resident within the jurisdiction of the court which pronounced the decree; (e) the court should therefore recognize the Mexican decree by an extension of the principle in *Armitage* v. *Attorney-General* (supra), since it was recognized by the court within whose jurisdiction the wife had resided for three years and whose competence to dissolve the marriage would now be recognized:—

Held, (1) that had the wife been ordinarily resident in the State of New York for three years prior to the institution there of proceedings for divorce, and had a decree been pronounced in those proceedings, the court would have recognized that decree although the jurisdictional test in New York is one year's residence only.

Travers v. *Holley* [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794; *Carr* v. *Carr* [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61; *Arnold* v. *Arnold* [1957] P. 237; [1957] 2 W.L.R. 366; [1957] 1 All E.R. 570; *Robinson-Scott* v. *Robinson-Scott* [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473; *Manning* v. *Manning* [1958] P. 112; [1958] 2 W.L.R. 318; [1958] 1 All E.R. 291; *Gerrard* v. *Gerrard*, The Times, November 18, 1958, applied.

(2) But that the English court would not recognize decrees which were not recognized by the court of the domicile except decrees pronounced by the English court in the exercise of its own statutory jurisdiction and decrees pronounced, as in the cases above, by foreign courts in strictly analogous circumstances. The principle that jurisdiction in divorce depends on domicile is otherwise still paramount; and from the terms of the statutory exceptions it would appear that Parliament expressly recognizes that test of jurisdiction.

Le Mesurier v. *Le Mesurier* [1895] A.C. 517; 11 T.L.R. 481 applied.

(3) That the Mexican decree was accordingly invalid, for it was not one which would be given direct recognition by the court of the domicile, and it would be a wholly illegitimate extension of the

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principle of comity, upon which *Travers* v. *Holley* (supra) and the subsequent cases turned, to hold that this decree should be recognized owing to the interposition of a residential qualification of the wife in a third State.

Armitage v. *Attorney-General* [1906] P. 135; 22 T.L.R. 306, distinguished.

Quaere whether the conduct of the wife in going to Mexico and founding proceedings upon her residence there (short though it was) terminated her "ordinary residence" in the State of New York.

Per curiam: Had the Mexican court had jurisdiction to dissolve the marriage, the collusive nature of the proceedings (in which no question of fraud on the Mexican court arose) would not have prevented recognition of the Mexican decree in England.

UNDEFENDED PETITION by husband for a declaration that his marriage had been validly dissolved by a Mexican decree of divorce on May 22, 1954. Proceedings upon a prayer in the alternative for a decree of divorce on the ground of desertion were stayed pending the hearing of the prayer for a declaration.

The following statement of facts is substantially taken from the judgment:

The husband's domicile of origin was English. The parties were married on February 4, 1950, the wife being the divorced wife of one William Simpson. At all material times they lived at 510, Park Avenue, New York City. There were no children. The court was satisfied that, subject always to the effect of the wife's short visit to Mexico in May, 1954 (when she obtained the Mexican divorce), and her actions and declarations there, the wife had continuously lived in New York State from the date of the marriage down to July, 1958. At the date of the marriage the husband was employed in the United States, but he made it plain to his wife that he had no intention of abandoning his domicile of origin.

At the end of 1952 the husband's appointment in the United States was coming to an end and, according to his evidence, he told his wife that he wished her to come and live with him in England, but she refused. On December 11, 1952, in New York, he was served with a summons for separation in an action commenced by the wife in the Supreme Court of New York. His Lordship said that at first he was under the impression that that action was something different from the wife's action for divorce or separation; but it was clear from the bound volume of pleadings in the New York action that those actions were one and the same. On December 19, 1952, the husband left New York for England, where he had lived ever since. Since that date he had not seen his wife or had any direct communication with her.

On April 29, 1953, he was served with his wife's complaint in the New York action, in which she alleged cruelty, desertion and adultery and prayed for divorce or, alternatively, separation. Only two paragraphs of that document required specific mention. Paragraph 2 read: "At the time of the commencement of this

"action and for more than one year past, the plaintiff has con-"tinually resided at 510, Park Avenue, New York City, New "York." The point of that allegation was that, as the expert on American law, Mr. Crane, said in evidence, the jurisdiction in divorce in the courts of New York depended on one year's residence. Paragraph 36 read as follows: "No decree of divorce "has been obtained by the defendant against the plaintiff in any "of the courts of any State or Territory of the United States, "or in any court of this State of competent jurisdiction, nor has "any other action been brought nor is any pending between the "plaintiff and defendant for the relief demanded herein." That averment no doubt appeared in pursuance of some rule similar to rule 4 (1) (*h*) of the Matrimonial Causes Rules, 1957.

The husband delivered a defence denying all the wife's allegations and cross-praying for a separation on the ground of desertion. The copy of that document was not dated.

On October 15, 1953, an order for alimony pendente lite and what would be called in England security for costs was made. On November 24, 1953, the amount of alimony was reduced on appeal by the Appellate Division of the Supreme Court.

In an affidavit sworn on January 22, 1954, the husband's New York lawyer, Mr. Granville Whittlesey, stated that on behalf of the husband he had approached the wife's lawyers with a view to "an amicable disposition of the entire matter," and he adumbrated a cross-charge of adultery against the wife.

On January 25, 1954, Mr. Edward Bennett, the wife's New York lawyer, swore an affidavit stating that the husband's lawyer had suggested that the wife should discontinue her action in New York and should go to Reno, in the State of Nevada, and commence an action for desertion to which the husband would file an appearance. The underlying suggestion was that such an action would not be defended.

On February 2, 1954, an order was made on the wife's application for the taking of evidence on commission, and also an order giving leave to the husband to amend his defence.

There were no further documents in the bundle of pleadings; but the court was told by Mr. Temple, for the husband, that on June 7, 1954, the New York action was by consent discontinued.

There was no evidence before the court as to what discussions and negotiations went on between the parties through their lawyers. But two most important documents were put in evidence. The first of these, dated April 14, 1954, was a power of attorney given by the husband to one Negrete, a Mexican lawyer. It was executed in London, and one of the attesting witnesses was the husband's London solicitor. It was in Spanish. The English translation was in these terms: "I, David Michael "Mountbatten, of full age, residing in the City of London, "England, British subject, a merchant, in the full exercise of "my civil rights, hereby make known: That I grant a special "power of attorney to licentiate Franciso Alfredo Negrete, a

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"resident of Ciudad Juarez, State of Chihuahua, Republic of "Mexico, to represent me before the courts of the said State of "Chihuahua in legal proceedings for divorce which have been or "are about to be brought against me by my wife, Romaine Pierce "Mountbatten née Simpson, until recently a resident of the City, "County and State of New York, and for this purpose I authorize "the said advocate to continue the action throughout all its "stages until a final decision is given; to appear on my behalf, "and ratify and confirm the petition, since incompatibility of "temperament actually exists between my wife and myself, "dispute and lodge objections, submit proofs, including that of "admission, make and answer interrogatories, renounce in my "name and for this special purpose the jurisdiction of my "domicile, and expressly to submit me to the jurisdiction of the "said courts in accordance with articles 22, 23 and 24 of the law "of divorce in the State of Chihuahua; to receive notifications, "appear at hearings of every kind; to challenge with or without "cause, judges, magistrates and other officials of justice; to inter-"vene in all legal appeals and to withdraw therefrom; including "injunction; execute agreements and make stipulations which in "his judgment may be expedient; to substitute this power of "attorney and revoke substitutions, reserving to himself at all "times the exercise thereof; and finally I grant him such powers "as may be necessary to fulfil the special objects of these "presents, by which I ratify and confirm all and every one of the "acts which my attorney may carry out and also those done by "persons appointed as substitutes. This power of attorney is "signed by me before a notary public and witnesses who sign in "the City of London, England, today April 14, 1954."

It was therefore plain that Mr. Negrete was being given by Lord Milford Haven complete power, in the undefended divorce suit that Lady Milford Haven was going to start in Mexico, to make every admission, to submit to the jurisdiction and to do everything to facilitate the obtaining of a divorce by the wife.

The court said that there was one phrase that perhaps needed a little explanation: "to receive notifications." The point of that was that, as was explained by Mr. Valls (the expert on Mexican law), the time for appeal from such a decree as was eventually pronounced by the courts of Mexico was the somewhat surprisingly short time of 24 hours from notification, and "notification" meant, if the parties were present or represented in court, the actual pronouncing of the decree. However strange it might appear to English lawyers, it seemed clear that in Mexican law there was nothing objectionable in a document such as this power of attorney. Indeed, according to the evidence of Mr. Valls, such a document appeared to be welcomed by the Mexican courts as tending to facilitate the speedy dispatch of judicial business. (His Lordship added that it was, nevertheless, somewhat surprising that his London solicitor had been prepared to associate himself with such a venture.)

The second document was signed in New York on May 15, 1954, by the wife, and on May 14, 1954, on behalf of the husband, by his attorney, Granville Whittlesey, his New York lawyer, mentioned above. It provided by clause 1 that "each party may "reside from time to time at such place, and conduct, carry on, "and engage in such employment, business, or profession as "either shall desire, without any control, interest or rights, "restraint or interference, direct or indirect, by the other party "hereto." Clause 2 provided for the payment by the husband to the wife of the sum of 10,000 dollars in full and complete discharge of the husband's obligations past and future for the support and maintenance of the wife. There were a number of other provisions regarding property, and clause 6 provided as follows: "In the event that either of the parties shall hereafter "prosecute an action for absolute divorce against the other in any "court, this agreement shall be presented to the court as con-"stituting the voluntary and complete settlement between the "parties of property rights and all claims for support and "maintenance of the wife, and either party may request the court "to incorporate this agreement in so far as it makes provision for "the support of the wife in any decree or judgment which it shall "render, and neither party will request nor consent to any decree "or judgment as to the maintenance and support of the wife "other than as herein provided, and this agreement shall not "merge in any such judgment or decree but shall survive." (The collusive nature of such documents is considered in the judgment.)

The evidence as to the obtaining of the Mexican decree was derived entirely from the decree itself and the explanation of it given by Mr. Valls. There were two translations into English of the decree (which was in Spanish), and these differed somewhat from each other. But their effect appeared to be the same. The material parts of the decree were as follows: "Citizen Rodolfo "Silva, secretary to the First Court in Civil Matters of the "District of Bravos, State of Chihuahua, Mexican Republic, "certifies that in the proceedings for necessary divorce brought "by Romaine Pierce Mountbatten née Simpson against David "Michael Mountbatten, a decree was issued in the following "terms: Decree.—City of Juarez, Chihuahua, on May 22, 1954. "Whereas to give a final decision in the proceedings for necessary "divorce brought by Romaine Pierce Mountbatten née Simpson "against David Michael Mountbatten." (There was a reference to a case number.) "And whereas: By petition dated in this "City the twenty-first day of the present month and year "Romaine Pierce Mountbatten née Simpson, stating that she "is a resident thereof as appears from the certificate granted to "her by the Municipal Presidency which is annexed to her said "petition, and furthermore submitting herself to the jurisdiction "of the court, instituted proceedings for necessary divorce

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"against her husband David Michael Mountbatten alleg-
"ing incompatibility of temperament between the two of them
"as grounds therefor, and declaring: That the marriage was
"contracted on February 4, 1950, in the District of Columbia,
"United States of North America, as appears from the respective
"certificate of marriage which was enclosed, together with its
"translation into Spanish owing to its being drawn up in English.
"That there are no children of the said marriage. Romaine Pierce
"Mountbatten née Simpson also added in her petition that
"regarding the property, rights and obligations of her marriage,
"her husband David Michael Mountbatten and herself had
"entered into an extrajudicial contract by mutual agreement,
"for which reason she does not consider it necessary to produce
"the same to the court. The petition was accepted, the respec-
"tive notification being ordered to be given to the respondent
"David Michael Mountbatten, and the petitioner Romaine Pierce
"Mountbatten née Simpson having appeared personally before
"the undersigned judge to submit her petition, she was notified
"of the decision accepting the same and she stated: That she
"ratifies her petition in every respect including what is stated
"as to her express submission which she makes to the jurisdiction
"of this court and produced the certificate of her registration
"in the municipal registry of residents of this City, and by
"notification dated the day of the date hereof the licentiate
"Francisco Alfredo Negrete as legal attorney of the respondent
"replied on his behalf to the petition lodged against him,
"admitting it in every respect and submitting expressly to the
"jurisdiction of this court, applying furthermore for the decision
"which is now being given in view of the fact that all the legal
"requirements have been complied with, including payment for
"the publication of the same; and whereas this court is com-
"petent to hear and give a decision on the present case according
"to what is stipulated in articles 22, 23 and 24 of the divorce
"law, by virtue of the fact that the petitioner Romaine Pierce
"Mountbatten née Simpson proved, by the certificate from the
"municipal president's office which she produced, that she has
"the necessary residential qualification for instituting proceedings
"and appeared and ratified her petition before the undersigned
"judge, lastly submitting herself expressly to the jurisdiction
"thereof, and in accordance with what is stipulated by article 28
"of the said law, the certificate of marriage of the parties, together
"with its translation into Spanish, was enclosed. As grounds for
"divorce, the petitioner put forward incompatibility of tempera-
"ment, being a reason allowed by section XIX of article 3 of the
"aforesaid divorce law; and on a claim being admitted in every
"respect it is considered to be fully proved according to article 370
"of the Code of Civil Procedure; subsidiarily: As it is stated in
"the petition that there are no children of the marriage and
"that regarding the property, rights and obligations arising from
"the marriage they had entered into an extrajudicial contract

"by mutual agreement, no decision may be given in this decree "in respect of those aspects. Wherefore and by virtue, further-"more, of" (and then certain articles are recited) "it is decreed: "First: The marriage entered into by David Michael Mount-"batten with Romaine Pierce Mountbatten née Simpson on the "4th February 1950 in the District of Columbia, United States "of North America, is declared dissolved with all the legal conse-"quences thereof, both parties being legally entitled to enter into "another marriage. Second: The petitioner is authorized to "reassume her maiden name. Third: Let the present decision "be registered, let it be published, let the certified copies that "may be applied for be issued to the parties concerned and in "due course let the documents in the proceedings be placed "among the records. Giving a final decision, thus citizen licen-"tiate Fernando Romero Figueroa, First Judge in civil matters "of the district of Bravos decreed and signs." There were then various signatures.

From that document it appeared that the wife's petition was filed on May 21, 1954, in the Mexican court. (His Lordship observed in his judgment that it was, perhaps, odd that the New York lawyers did not—either on the ground of expediency or out of courtesy to their own court—arrange for the New York action to be discontinued before the Mexican proceedings were started.) The petition was based upon incompatibility of temperament and was accompanied by a certificate from the Municipal Presidency that the wife was a resident of Ciudad Juarez, and the wife submitted herself to the jurisdiction of the court. She appeared personally in court. It was not clear whether she appeared personally in court both on May 21 and 22, 1954; but it seemed probable that it was only on the latter day—what we should call the day of the hearing. The husband was represented by Negrete, who admitted the contents of the petition and submitted expressly to the jurisdiction of the court. On May 22, 1954, the decree of dissolution was made.

That decree was accepted, according to the evidence of Mr. Valls, as conclusive proof by Mexican law of a valid decree of divorce. Mr. Crane stated that in his opinion a divorce obtained in such circumstances would be accepted without question in the State of New York, and that in his opinion Lady Milford Haven would at the date of these proceedings unquestionably be held by the New York court to be a single woman.

*R. J. A. Temple Q.C.** and *Colin Duncan* for the husband.

Roger Ormrod Q.C. and *A. T. Hoolahan* for the Queen's Proctor.

In addition to those referred to in the judgment the following

* Mr. Temple was not the leading counsel advising the husband at the time of the Mexican divorce and was only instructed on his behalf much later. EDITOR.

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cases were cited in argument: *Cass* v. *Cass* (*orse. Pfaff*)[1]; *Clark* v. *Clark*[2]; *Wyllie* v. *Martin*[3]; *Owen* v. *Robinson*[4]; *Crowe* v. *Crowe*[5]; *Sealey* (*orse. Callan*) v. *Sealey*[6]; *Sinclair's Divorce Bill*[7]; *Bater* v. *Bater* (*orse. Lowe*).[8]

DAVIES J. reading his judgment, said: This is a husband's petition dated January 15, 1958, and filed on January 16, 1958. It is undefended. By it the petitioner prays in the first instance for a declaration that the marriage celebrated between the parties on February 4, 1950, at the National Presbyterian Church, in the District of Columbia, United States of America, was validly dissolved on May 22, 1954, by a decree of the First Civil Court of the District of Bravos, sitting at Ciudad Juarez, in the State of Chihuahua in the Republic of Mexico. Alternatively, the petitioner prays for a decree of dissolution on the ground of desertion, asking for the exercise of the discretion of the court in respect of his own adultery.

By an order dated July 15, 1958, proceedings on that part of the prayer which asks for dissolution were stayed pending the hearing of the cause on the prayer for the above-mentioned declaration.

On October 6, 1958, the suit came on for hearing, and it immediately became apparent that it involved an important point of law, such as would be difficult for the court to determine without a presentation of both sides of the case. I, therefore, indicated that I should send the papers to Her Majesty's Proctor in order that he might be represented. Meanwhile, Mr. Temple for the petitioner continued his opening of the case and called his witnesses, the petitioner, Mr. Valls, an expert on Mexican law, and Mr. Crane, an expert on New York law.

The hearing was then adjourned and was resumed on November 24, 1958, when the Queen's Proctor appeared by counsel.

Whenever in this judgment the expressions "husband" or "wife" are used, that is merely for convenience and is, of course, entirely without prejudice to the petitioner's contention that at the date of this petition the parties had ceased to be husband and wife. Again, whenever reference is made to Mexico, Mexican law, Mexican court, Mexican decree or divorce, this means, unless by the context it otherwise appears, the State of Chihuahua, the law of that State, the court which applies that law, and the decree or divorce pronounced by such court.

[His Lordship then stated the facts substantially as set out above, saying of the documents dated April 14, 1954, and May 15, 1954:] Those two documents make it plain, in my judgment, that the petition which the wife in a matter of days after the

[1] (1910) 26 T.L.R. 305.
[2] (1921) 37 T.L.R. 815.
[3] 44 B.C.R. 486.
[4] [1925] N.Z.L.R. 391.
[5] [1937] 2 All E.R. 723.
[6] [1953] P. 135; [1953] 2 W.L.R. 910; [1953] 2 All E.R. 942.
[7] [1897] A.C. 469.
[8] [1906] P. 209; 22 T.L.R. 408.

execution of the second of them presented in the Mexican court was, according to our notions, wholly collusive. In saying that, I wish to make it clear that there is no suggestion that there was any fraud on the Mexican court. What I mean is that the petition was presented in Mexico as a result of a bargain made between the parties that the wife should do so on the basis of a financial settlement between them and upon the understanding that the husband would not defend. It is right that it should be categorically stated, in fairness to both husband and wife, that it is clear that whatever they did they did with the advice and assistance throughout of their lawyers, American, Mexican and English.

It is contended by Mr. Ormrod on behalf of the Queen's Proctor that this finding of collusion is a material matter for consideration in deciding whether the Mexican decree is entitled to recognition in this court. But, in my opinion, that submission is not correct. There is abundant authority for the proposition that if the decree of a foreign court is otherwise entitled to recognition, the fact that the law and practice of the foreign court is different from ours does not matter, save, possibly, if it can be shown to be contrary to natural justice. Moreover, it is important that one should not allow one's instinctive dislike and disapproval of a transaction of this sort to affect the consideration of the point of law which arises in this case. I do not pause to consider what, if any, effect the agreement between the parties for a divorce and the provisions of clause 1 of the document executed in May, 1954, would have upon the allegation that thereafter the wife was in desertion of the husband. That question is not now before the court, and, in any case, the written document is by its express terms to be construed and interpreted according to the laws of the State of New York.

[After considering the material parts of the Mexican decree as set out above, his Lordship continued:] This decree, according to Mr. Valls' evidence, which, of course, I accept, is by Mexican law conclusive proof of a decree of divorce. It is recognized all over Mexico, and, by the Treaty of Monte Video of 1889, in Bolivia, Paraguay, Peru and Uruguay. It is final unless appealed from within 24 hours from notification. Notification in the present case was the reading of the decree in court, both parties being represented. Jurisdiction was based on two grounds, either of which would have been of itself sufficient. The first ground was the residence of the wife as certified by the municipal registry: astonishingly enough, according to our ideas, residence connoted nothing more than mere physical presence at the moment of the granting of the certificate. The second ground was that both parties expressly submitted to the jurisdiction. It may be observed, incidentally, that the Mexican law in terms contemplates divorce by mutual consent.

The only remaining question of fact is as to the law of the State of New York, that is to say, whether the courts of that

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State are prepared to recognize decrees, such as the one in question, granted by the courts of Chihuahua as validly dissolving the marriage of persons resident in the State of New York. The evidence of Mr. Crane on this point was quite definite. "The "question has come up on a great many occasions," he said. "It is perfectly clear and I think beyond question of doubt that "a divorce in the State of Chihuahua where one party to the suit "there appears in person, irrespective of how long, and the other "party appears by counsel—as I understand the case to be here "—will be accepted without question in the State of New York "as a matter of comity."

He supported this view by reference to three decided cases: *Leviton* v. *Leviton*,[1] *Caswell* v. *Caswell*[2] and *Fricke* v. *Bechtold*.[3]

The *Leviton* case[1] was heard in the New York Supreme Court in 1938 before McCook J. His judgment is in these terms: "In "this action for divorce by a woman against her husband the "amended complaint makes the following allegations: The parties "were married in London, England, July 17, 1934, being at that "time residents of the State of New York; between August 1, "1936, and the commencement of the action the defendant "committed adultery with a woman calling herself defendant's "wife (not the plaintiff); the defendant, after a bigamous re-"marriage, has lived and is living in adulterous intercourse with "that woman in New York, California and other states. "Plaintiff asks that the bonds of marriage be dissolved and that "reasonable provision for her support be made. The answer "interposes four defences. In the first it sets forth that: The "Civil Court of First Instance of the Bravos District at the City "of Juarez, State of Chihuahua, Republic of Mexico, was a court "of general jurisdiction over divorce and dissolution of marriage; "on August 6, 1935, the plaintiff instituted a divorce action "against the defendant in that court; in her petition the plaintiff "attached a residence certificate dated August 6, 1935, issued "by the Mayor's office of the City of Juarez, stating that her "name was inscribed in the municipal register of residents of "that city, and a certificate to the same effect containing the "defendant's name was also attached; defendant was personally "served with process in that city; he appeared by attorney, sub-"mitted himself to the jurisdiction of that court and filed an "answer; on August 6, 1935, both parties were in Juarez and "appeared personally before the court; the law of Mexico "applicable to the action provides that in 'mutual consent' cases "the residence is fixed by the residence of either party and is "proven by the certificate of the municipal registry; on August 6, "1935, the court rendered judgment in favour of the plaintiff, "a copy of the judgment being annexed to the answer; the

[1] (1938) 6 N.Y.Supp. 2nd series, 535.

[2] (1952) 111 N.Y.Supp. 2nd series, 875.

[3] (1957) 168 N.Y.Supp. 2nd series, 199.

"judgment recited, among other things, that the domicile of the "parties and the cause of action had been proven and that the "competency of the court to adjudge had been properly estab-"lished; on August 6, 1935, the judgment was duly filed and "recorded."

It will be seen, therefore, that, in essence, that case is the same as this, save that in that case both parties were in Mexico and that apparently that decree was obtained in one day, whereas in this case it took two days, or, at any rate, 24 hours.

"The second defence sets forth that, in reliance upon the "Mexican divorce and induced by it, the defendant, remarried "and the plaintiff recognized defendant's remarriage, herself "contracted to remarry, and is estopped from questioning the "validity of defendant's remarriage. The third defence alleges "that the adultery, if any, was committed with the plaintiff's "consent, procurement, etc. The fourth defence sets forth that "the defendant was legally remarried after a lawful and valid "Mexican divorce, and that plaintiff by her act in procuring "that divorce induced the remarriage and recognized it, fully "condoning and forgiving the defendant.

"All four defences depend upon the Mexican divorce of "August 6, 1935.

"The answer nowhere alleges that at the time of the "institution of the Mexican divorce action the parties in fact "either resided or were domiciled in Mexico.

"The general principles of law with respect to foreign divorces "are clear and have been stated frequently by the courts of the "state. This case, however, presents a novel situation, and "neither counsel has adduced controlling authority. The deci-"sions cited by plaintiff, chiefly relating to constructive or other "defective appearance in foreign divorce actions, are clearly "distinguishable.

"(1) Moral, ethical or social considerations, when embodied in "the declared public policy of this state, undoubtedly permit our "courts on appropriate occasion to refuse recognition of divorces "granted by other jurisdictions. The Federal Constitution does "not forbid such refusal. On the other hand, New York courts "customarily give full recognition to divorces granted in other "states and countries even where the ground, the domicile, or "other prerequisities, singly or together, are found to be such that "they would be held insufficient towards securing a New York "decree after a trial taking place here. The ultimate question "raised by the first defence is, therefore, whether our public "policy justifies departure, in this case, from the general rule.

"(2, 3) The so-called mail-order divorces, Mexican and other-"wise, have been held invalid. Careful scrutiny is always applied "to judgments without personal appearance by the defendant. "In any collateral attack, however, our court ordinarily will "not question the result where both parties have appeared and "where on the face of the decree is presented clear evidence

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"of jurisdiction over them by the court which rendered the "judgment.

"(4, 5) On this motion there can be no dispute that all the "acts enumerated in the first defence actually were performed. "The circumstance that they transpired within twenty-four hours "of one another is not in and of itself sufficient to upset the "decree. Upon the face of the complaint now under discussion "we may discover an element of suspicion through the simul-"taneous occurrence of so many material events. That is, how-"ever, answered and overcome by our duty to recognize the "jurisdiction of the Mexican court, established by the appearance "of both parties before it. The Mexican law respecting residence "has been followed. The establishment of a domicile or residence "in the strict sense is a question both of intent and act. The "parties acted; we must accept the Mexican court's conclusion "upon their intent.

"An illustration from one of our sister states: The period now "required in Nevada is even shorter than previously, but the "abridgement does not prevent us from recognizing residence, nor "can it lead to an inference of no jurisdiction in the Nevada court. "We may disagree with the law of Mexico or Nevada establishing "rules for residence. We may even disapprove them as express-"ing theories repugnant to our own standards, as applied to "corresponding litigation initiated within this state. It does not "follow that we should disturb a decree entered either in Nevada "or Mexico if it complies with the requirements of their statutes, "for we then say that the court had jurisdiction of the subject-"matter and the parties, and thus was competent to act."

It may be (and I speak with the utmost deference upon a matter of which, of course, I have no knowledge at all) that there is a distinction, or there might be a distinction, between the attitude of the New York courts to decrees of other states of the Union and those of foreign states. For the "full faith and "credit" clause of the Constitution may be material with regard to the former, whereas, of course, it cannot apply to the latter.

I do not think I need read any more of the judgment. The grounds on which it proceeded and its reasoning are perfectly plain and clear from the extract that I have already read.

The only other New York case to which I need refer is *Fricke* v. *Bechtold*,[4] the last one on this point. It is very short. The judge (Rabin J.) says: "Although the plaintiff aided and abetted "the defendant to obtain her Mexican decree, and indeed financed "the entire project, that factor does not bar him from attacking "the Mexican decree. Nevertheless such decree, grounded as it "was upon the personal appearance of the defendant in the "divorce granting court and the filing of a notice of appearance "by her first husband through an attorney designated by him, is "entitled to recognition under the doctrine of comity." Then a number of authorities are cited by the judge.

[4] 168 N.Y.Supp. 2nd series, 199.

It is plain from the citations in the latter case that there is a considerable body of authority to the same effect.

Mr. Crane added that in his opinion Lady Milford Haven would at the present time unquestionably be held by the New York court to be a single woman.

He also dealt in his evidence with another point which was troubling me a little—namely, whether the attitude of the New York courts to the recognition of the Mexican decree would be in any way affected by the fact that at the date of that decree there was already pending in the New York court a suit between the same parties for dissolution. Mr. Crane's evidence on this point starts in this way. I asked, "Is there any reference "to the previous proceedings which Lady Milford Haven "had previously commenced in New York?" Mr. Temple said, "I do not think so, but I will make certain. I do "not think she did. Mr. Crane, would the recognition of the "Mexican decree be affected in any way by the fact that the wife "had commenced proceedings in the courts of New York? (A) I "do not think so, sir. I cannot see why. (Q) The fact that she "called the machinery of the State into operation based on her "residence there, would that in any way affect the validity, by "New York law, of her Mexican decree? (A) No, sir." Then I asked a question: "Arising out of your last answer, Mr. Crane, "you have told me about these other cases: supposing this case "now by Lord Milford Haven, instead of being in the English "court, were, in more or less parallel circumstances, before a "New York court and the New York judge had before him the "fact that in December, 1952, apparently the wife there com-"menced some proceedings—the precise nature of which I do not "know" (but I have made this clear now in my judgment) "but it is said to have been for a separation, that in April of "1953 she commenced proceedings for a dissolution or, alterna-"tively, for a separation, and that that suit had been proceeding "happily with a lot of interlocutory proceedings for some twelve "months until February, 1954, and then she went off to Mexico: "would not the American judge say, 'But now, when a New "'York court is seized with this matter, what did she go off "'to Mexico for?'? (A) I would say this, my Lord. The "New York court—the New York judge might not be all that "pleased about it, but I feel quite certain, on the basis of the "cases I have produced, that they would do nothing about it "whatsoever. It is entirely my feeling. I think this stems "back to a concept of American law, which is the ability of the "female party to a marriage to adopt any residence or domicile "she pleases for the purpose of obtaining a divorce—which is a "very old principle of American law."

Mr. Crane was unable to produce any authority in support of this view. But the Queen's Proctor did not call any evidence to the contrary and expressed no wish to cross-examine Mr. Crane. I feel, therefore, that I am bound to find that the New York

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courts would recognize as validly dissolving the marriage of these parties the decree obtained in Mexico by the wife.

On these facts, then, it is possible to state the question of law which arises for decision in the present case. The submission for the husband is as follows:

(1) The New York court is the court of the residence of the wife.

(2) The New York court would recognize the Mexican decree.

(3) While formerly our courts took the view that the court of the domicile of the parties was the only court which had jurisdiction to dissolve their marriage, nevertheless we would recognize the validity of a decree pronounced alibi if such a decree was recognized as valid by the court of the domicile (*Armitage* v. *Attorney-General*[5] (*Gillig cited*), *Gillig* v. *Gillig*).

(4) As a result of the decisions in *Travers* v. *Holley*,[6] *Carr* v. *Carr*,[7] *Arnold* v. *Arnold*,[8] *Robinson-Scott* v. *Robinson-Scott*,[9] *Manning* v. *Manning*[10] and *Gerrard* v. *Gerrard*,[11] the English courts now recognize foreign decrees pronounced at the suit of the wife if the wife at the time of the presentation of her petition had been for three years resident within the jurisdiction of the court which pronounced the decree, even though the jurisdictional test of the foreign court is other than that of three years residence and the ground of the decree was not a ground upon which this court could act.

(5) Therefore, this court by an extension of the principle of *Armitage* v. *Attorney-General*,[12] should in the present case recognize the Mexican decree, since it is recognized by the court in whose jurisdiction the wife has resided for three years and whose competence to dissolve the marriage we would now recognize.

It is important, before considering those submissions and the arguments by which they are supported, to promise two fundamental matters. In the first place, it is freely admitted by Mr. Temple for the husband—as, indeed, he has to admit—that, if the question before this court were whether this court would give direct recognition to a Mexican decree granted to one of two parties domiciled in England and there were no question of the interposition of the jurisdiction of the New York court or of any residential qualification of the wife in that jurisdiction, this court would certainly not recognize the decree. Secondly, it is expressly conceded in this case that in our law Lady Milford Haven never at any time after the marriage had or preserved a New York domicile, and that at all material times her domicile was English. Whether the contrary could have been successfully

[5] [1906] P. 135; 22 T.L.R. 306.

[6] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.

[7] [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61.

[8] [1957] P. 237; [1957] 2 W.L.R. 366; [1957] 1 All E.R. 570.

[9] [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.

[10] [1958] P. 112; [1958] 2 W.L.R. 318; [1958] 1 All E.R. 291.

[11] The Times, November 18, 1958.

[12] [1906] P. 135.

argued, I do not know. But that point is fundamental to the consideration of the present case.

The approach by Mr. Temple to the problem involved was first of all to examine the history of the doctrine of domicile as the test of the jurisdiction of our own courts, and thereafter to consider to what extent a change in the application of that doctrine has affected the attitude of our courts towards the recognition of foreign decrees.

Domicile as the test of jurisdiction, as is rightly pointed out, depends in the first instance on case law. Not even down to the present Matrimonial Causes Act, 1950, is it expressly enacted by statute that the jurisdiction of this court to dissolve a marriage depends on the domicile of the parties. But it is plain that, at any rate from 1895 and the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier*,[13] the doctrine was really beyond dispute. And it would serve no purpose to cite any of the other authorities on the point.

It is not necessary to consider the apparent breach of this rule made by *Stathatos* v. *Stathatos*[14] and *De Montaigu* v. *De Montaigu*,[15] following a dictum of Sir Gorell Barnes P. in *Ogden* v. *Ogden* (or *Phillip*).[16] For those decisions are now discredited. (See *Attorney-General for Alberta* v. *Cook*,[17] *H.* v. *H.*,[18] *Herd* v. *Herd*[19] and see *Travers* v. *Holley*, *per* Hodson L.J.[20]

The law on this subject apart from statute is conveniently and succinctly summarized by Lord Merrivale P. in *H.* v. *H.*[21]: "... under [English] law [I substitute 'English' for 'British'] "the jurisdiction to decree divorce depends on domicile; that the "domicile of the husband determines the domicile of the wife; "and that independent authority to decree divorce cannot, con-"sistently with English law, co-exist at the same time in two "sovereign States."

The history of the Indian Divorce Act, 1869, an Act of the Indian legislature, is an interesting example of the omnipotence of this principle. That Act, in effect, purported to empower the High Courts of India to grant divorces to Christians resident in India if the marriage had been celebrated in India or the matrimonial offence had been committed there. In *Keyes* v. *Keyes and Gray*[22] it was held that that Indian Act did not empower the Indian courts to grant divorces to persons not domiciled in India. In order to remedy the serious situation which then arose owing to the invalidation of divorces pronounced by the Indian courts, there was passed by Parliament the Indian Divorce (Validity) Act, 1921 (11 & 12 Geo. 5, c. 18). This provides as follows: "Any decree granted under the Act of the Indian Legis-"lature known as the Indian Divorce Act, 1869, and confirmed or

[13] [1895] A.C. 517; 11 T.L.R. 481.
[14] [1913] P. 46; 29 T.L.R. 54.
[15] [1913] P. 154; 29 T.L.R. 654.
[16] [1908] P. 46, 82, 83; 24 T.L.R. 94.
[17] [1926] A.C. 444; 42 T.L.R. 317.
[18] [1928] P. 206; 44 T.L.R. 711.
[19] [1936] P. 205; 52 T.L.R. 709; [1936] 2 All E.R. 1516.
[20] [1953] P. 246, 255, 256.
[21] [1928] P. 206, 212.
[22] [1921] P. 204; 37 T.L.R. 499.

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"made absolute under the provisions of that Act, for the dissolu-
"tion of a marriage the parties to which were at the time of the
"commencement of the proceedings domiciled in the United
"Kingdom, and any order made by the court in relation to any
"such decree, shall, if the proceedings were commenced before
"the passing of this Act, be as valid, and be deemed always to
"have been as valid, in all respects, as though the parties to the
"marriage had been domiciled in India."

As I see it, the legislature is there giving express recognition to the principle that the criterion of jurisdiction is domicile and is legalizing an exception to it.

By the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, a limited jurisdiction was given by the Imperial Parliament to the courts of India to dissolve marriages of parties domiciled in the United Kingdom as if they were domiciled in India. The underlying principle is obviously the same. It is interesting to note that by the Indian Independence Act, 1947, this jurisdiction—delegated to the Indian courts by the earlier Acts—was expressly taken away upon the creation of the two independent Dominions of India and Pakistan.

The next matter to which Mr. Temple referred, going back in order of date, was the Matrimonial Causes (Dominion Troops) Act, 1919 (9 & 10 Geo. 5, c. 28). That Act so far as material provides: "Where a marriage has been contracted in the United
"Kingdom during the present war by a member of His Majesty's
"Forces domiciled in any of His Majesty's possessions or protec-
"torates to which this Act applies, the competent court in that
"part of the United Kingdom where the marriage took place
"shall, any question of domicile or residence notwithstanding,
"have full jurisdiction and power to entertain, hear and deter-
"mine any of the matrimonial proceedings specified in the
"Schedule to this Act, where such proceedings are instituted by
"either party to the marriage, and to make decrees and orders in
"relation to such proceedings, as though the parties to the mar-
"riage were domiciled or (where the jurisdiction of the court
"depends upon residence) resident in that part of the United
"Kingdom." "Residence," of course, refers to such things as judicial separation. "Provided that this Act shall not apply in
"any case where the parties to the marriage have at any time
"since the marriage resided together in the country of the
"husband's domicile."

Here, again, is special legislation to deal with a special situation, and the phrases "any question of domicile or residence
"notwithstanding" and "as though the parties were domiciled
"or (where the jurisdiction of the court depends on residence)
"resident in that part of the United Kingdom," are a clear recognition by the legislature that in general jurisdiction in divorce depends on domicile. It is also to be noted that it is provided that the Act shall not apply if the parties at any time since

marriage resided together in the country of the husband's domicile.

In my opinion, no great assistance is to be derived from a consideration of section 8 of the Matrimonial Causes Act, 1937, now replaced by section 16 of the Act of 1950, and the decision of Pearce J. thereunder in *Wall* v. *Wall*.[23] In effect, Pearce J. held that on a petition for dissolution and presumption of death it would be absurd to attach any weight to the domicile of the husband who ex hypothesi was supposed to be dead and that the residence of the wife was sufficient (see *Deacock* v. *Deacock*[24]). That section was added to by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949. "In proceedings under subsection (1) of section 8 of the Matrimonial Causes Act, 1937 (which enables the court to make "a decree of presumption of death and dissolution of marriage), "the court shall have jurisdiction in the following cases only, "that is to say—(*a*) in any proceedings, if the petitioner is "domiciled in England; (*b*) in proceedings by the wife, if she "is resident in England and has been ordinarily resident there "for a period of three years immediately preceding the commencement of the proceedings; and in determining for the "purposes of this subsection whether a woman is domiciled in "England, her husband shall be treated as having died immediately after the last occasion on which she knew or had "reason to believe him to be living."

One sees there again that domicile is brought in and that a wife is given an alternative qualification of three years' ordinary residence.

The relevant statutory provision is now section 16 of the 1950 Act: "Any married person who alleges that reasonable "grounds exist for supposing that the other party to the "marriage is dead may, if he is domiciled in England, present "a petition to the court to have it presumed that the other "party is dead and to have the marriage dissolved, and the "court, if satisfied that such reasonable grounds exist, may "make a decree of presumption of death and of dissolution of "the marriage."

There in the current Act, therefore, the test of domicile for the exercise of this particular jurisdiction is the basic one, though the alternative qualification for a wife of three years' ordinary residence is preserved by section 18 (2).

The Matrimonial Causes (War Marriages) Act, 1944, was passed to deal with special cases of hardship similar to those covered by the Matrimonial Causes (Dominion Troops) Act, 1919. It applied to marriages during the war by women domiciled in England to men domiciled outside the United Kingdom. It did not apply to any case where the parties at any time after the marriage had resided in the country of the husband's

[23] [1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927.

[24] [1958] P. 230; [1958] 3 W.L.R. 191; [1958] 2 All E.R. 633.

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domicile. What it did was to provide that in the case of marriages to which the Act applied this court should have jurisdiction as though both parties were domiciled in England. Here again it appears that Parliament is expressly recognizing that the test of jurisdiction is domicile.

The last and most important of the statutory provisions in the history of this matter is the present section 18 (1) of the 1950 Act. Section 18 (1) (*a*) replaces section 13 of the Matrimonial Causes Act, 1937, which was the actual section discussed in *Travers* v. *Holley*,[25] and section 18 (1) (*b*) replaces section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. "Without prejudice to any jurisdiction exercisable by the court "apart from this section, the court shall by virtue of this section "have jurisdiction to entertain proceedings by a wife in any of "the following cases, notwithstanding that the husband is not "domiciled in England, that is to say:—(*a*) in the case of any "proceedings under this Act other than proceedings for pre-"sumption of death and dissolution of marriage, if the wife has "been deserted by her husband, or the husband has been de-"ported from the United Kingdom under any law for the time "being in force relating to the deportation of aliens, and the "husband was immediately before the desertion or deportation "domiciled in England; (*b*) in the case of proceedings for "divorce or nullity of marriage, if the wife is resident in "England and has been ordinarily resident there for a period "of three years immediately preceding the commencement of "the proceedings, and the husband is not domiciled in any "other part of the United Kingdom or in the Channel Islands "or the Isle of Man." Subsection (2) has nothing to do with this point. Subsection (3): "In any proceedings in which the "court has jurisdiction by virtue of this section, the issues "shall be determined in accordance with the law which would be "applicable thereto if both parties were domiciled in England "at the time of the proceedings."

It is apparent that the two paragraphs of section 18 (1) deal with different cases. (a) deals with the case of the wife of a man domiciled here who deserts her or is deported; it allows her to take proceedings here despite any subsequent change of domicile by the husband. The provision, as it were, notionally preserves for her her English domicile for the purpose of taking proceedings. (b) is, of course, far wider. It allows a wife to take proceedings here, whatever her domicile, if she has been ordinarily resident here for three years, provided that the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or Isle of Man.

It is, as I think, important to note the provisions of section 18 (3), which seem to indicate that these special provisions are exceptions to the general rule and that apart from express

[25] [1953] P. 246.

statutory provisions the principle and the law of domicile are still paramount.

It is submitted by the husband that for wives the jurisdictional basis in our law has been expanded and that for them we have equated three years' residence with domicile. A wife, it is said, in our law retains all her rights in the court of her domicile and has in addition a parallel and concurrent right to proceed in the courts of the place where she has resided for three years. To the extent to which our law so provides, that is undoubtedly true. But I venture to repeat what I said in *Dunne* v. *Saban*[26] (which, of course, was a recognition case, not a jurisdiction case): "It seems to me that the statutory "exceptions to the law regarding domicile as being the test of "the jurisdiction to dissolve a marriage are exceptions and that "the rule, apart from these exceptions, remains in full force."

The same view was expressed by Hodson L.J. in *Levett* v. *Levett and Smith*[27] (another recognition case) where he said that the position in this country is that domicile is the foundation of jurisdiction and that there are exceptions to the rule.

What then is the effect of these statutory alterations of the jurisdiction of our own courts upon the principles upon which we recognize foreign decrees and upon the question whether in the present case we should recognize the decree of the Mexican court as being good in law here? It must be remembered that the decree was not pronounced by the court of the wife's domicile nor by the court of a place in which she had resided for three years or at all, unless one is to accept the technical residence in the Mexican sense for, it seems, something like 24 hours. The claim for recognition, I repeat, is based upon the fact that the decree is recognized by the court in which it is said that the wife had been resident or ordinarily resident for three years.

There is no doubt that, in general, our courts have for many years refused to recognize the decrees of any foreign court other than those of the court of the domicile of the parties. It is not necessary to do more than refer to the decision of the House of Lords in *Shaw* v. *Gould*,[28] and in particular to the speech of Lord Westbury.[29] Since that date the current of high authority has been constant. It is argued that this rule was based on a wrong view of foreign law and a misunderstanding of the jus gentium. Whether that contention be right or wrong—and I am far from saying that it is right—it is, in my opinion, far too late in the day to ask any court in this country to depart from this well-established principle.

But it is said that there is an exception to this rule. The exception which is relied upon in the present case is that based

[26] [1955] P. 178, 190; [1954] 3 W.L.R. 980; [1954] 3 All E.R. 586.

[27] [1957] P. 156, 161; [1957] 2 W.L.R. 484; [1957] 1 All E.R. 720.

[28] (1868) L.R. 3 H.L. 55.

[29] Ibid. 80 to 88.

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upon *Armitage* v. *Attorney-General*.[30] The usual statement of the effect of the decision in that case may conveniently be taken from volume 7 of Halsbury's Laws of England, 3rd ed., title "Conflict of Laws," at p. 114: "The English courts will recog-"nize as having extra-territorial validity any decree of divorce "which is also recognized as valid by the courts of the country "of the domicile, whether those courts have themselves pro-"nounced the decree or not." It is doubtful, however, whether the actual decision in that case justifies so wide a proposition, as to which an interesting discussion by one of the gentlemen who gave expert evidence on American law in the case is to be found in volume 17 of the Transactions of the Grotius Society, at pp. 131–134.

The headnote in *Armitage* v. *Attorney-General* [30] is as follows: "The courts of this country will recognize the binding effect of a "decree of divorce obtained in a State where the husband was "not domiciled, if the courts of the country or State of his "domicile would recognize the validity of the decree. G., an "American citizen temporarily resident and carrying on business "in England, but who never abandoned his domicile of origin in "the State of New York, married an Englishwoman in England. "She afterwards instituted proceedings under the Guardianship "of Infants Act, 1886, which were compromised by a deed of "separation. Some years later she instituted, in the State of "South Dakota, proceedings for a divorce, to which he put in an "answer and cross-claim, the latter being dismissed, and a decree "being pronounced on the wife's petition, upon a ground which "would not constitute a ground for dissolving the marriage either "in the courts of the husband's domicile or in this country. "Upon evidence which satisfied this court that the courts of the "husband's domicile would recognize a decree so obtained:— "*Held*, that the South Dakota decree of divorce must be recog-"nized as a valid dissolution of the marriage, and that the "subsequent marriages of the respective spouses were conse-"quently valid."

Before turning to the judgment of Sir Gorell Barnes P., it is important to note an express finding of fact by him which is, of course, taken from his judgment.[31] I will read from the second paragraph: "She finally determined to break with this country "and to restart her life in America. In proceeding thither she "had in her mind the idea that she might take proceedings there "for a divorce from her husband, Mr. Gillig; but she had "absolutely determined to quit this country and to establish her-"self in America. She proceeded to Yankton, in the State of "South Dakota, and one of her objects in doing so was to "institute proceedings there for divorce. She acquired a domicile "there in a sense which is recognized in America, but is foreign "to our notions in this country. According to the evidence of

[30] [1906] P. 135. [31] Ibid. 137.

"Mr. John Arthur Barratt, if a woman is separated from her "husband under circumstances which would have given her a "cause of action against him she may acquire a separate "domicile."

Sir Gorell Barnes P. also said[32]: "The only question that "remains for consideration is this question of English law: Are "we to recognize in this country the binding effect of a decree "obtained in a State in which the husband is not domiciled if the "courts of the State in which he is domiciled recognize the "validity of that decree? This point has not been distinctly "determined in the courts of this country." Then Sir Gorell Barnes P. refers to *Harvey* v. *Farnie*,[33] and proceeds: "The "evidence, in the present case, shows that in the State of New "York the decision of the court of South Dakota would be recog-"nized as valid. The point then is: Are we in this country to "recognize the validity of a divorce which is recognized as valid "by the law of the domicile? In my view, this question must be "answered in the affirmative. It seems to me impossible to come "to any other conclusion, because the status is affected and "determined by the decree that is recognized in the State of New "York—the State of the domicile—as having affected and "determined it."

In view of the express finding of fact by Sir Gorell Barnes P. that the wife there had by New York law, the law of the domicile, acquired a domicile in South Dakota, it seems that perhaps a more accurate statement of the effect of that case would be that our courts will recognize a decree of divorce which is recognized as valid by the court of the husband's domicile as having been pronounced by a court in the jurisdiction of which the wife had obtained a separate domicile. But despite this, it is right, in my opinion, that as a judge of first instance I ought to act upon the interpretation of *Armitage* v. *Attorney-General*[34] which has been current and accepted for the last 50 years.

The next step in the argument for the husband is, of course, to show that the rule in *Armitage* v. *Attorney-General*[34] must now be taken to necessitate the recognition by our courts of a decree recognized as valid by the courts of the jurisdiction within which the wife had resided for three years at the date of the petition or suit, even though the decree was pronounced not by that court but by a third court in which she could not, in our law, be said to have been domiciled or resident.

That proposition is based upon the decision in *Travers* v. *Holley*[35] and the cases subsequent thereto upon the question of recognition of foreign decrees. It is right that I should mention that Mr. Ormrod expressly desires to keep open for future argument in the appropriate place the question whether *Travers* v. *Holley*[35] was rightly decided. It is pointed out that the decision to the opposite effect by Lord Strachan, in *Warden* v.

[32] [1906] P. 135, 141.
[33] (1882) 8 App.Cas. 43.
[34] [1906] P. 135.
[35] [1953] P. 246.

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Warden,[36] was apparently not cited to the Court of Appeal in *Travers* v. *Holley*.[35] It is also to be observed that in *Fenton* v. *Fenton*[37] the Full Court of Victoria (which normally follows the English Court of Appeal), after a review of the earlier cases, expressly refused to follow *Travers* v. *Holley*[38] (see in particular the judgment of O'Bryan J.[39]). But *Travers* v. *Holley*[40] is, of course, binding upon me.

It is, I suppose, correct to say that the subsequent cases of *Arnold* v. *Arnold*,[41] *Robinson-Scott* v. *Robinson-Scott*,[42] *Manning* v. *Manning*,[43] and *Gerrard* v. *Gerrard*,[44] which undoubtedly extended the doctrine of *Travers* v. *Holley*,[45] are not strictly binding upon me. But it is plainly desirable, in my opinion, that I should accept and follow these decisions unless and until they are disapproved of by higher authority. And I propose to do so.

There is one other matter which should be mentioned before turning to those cases. Mr. Temple concedes that it is essential to the success of his argument that it should be shown that Lady Milford Haven was ordinarily resident in New York for the three years immediately preceding the commencement of her suit for divorce in Mexico. In view of the fact that she obtained for the purpose of taking proceedings in Mexico a certificate that she was resident there, even though the conception of residence in Mexican law is so different from ours, it seems to me to be most doubtful whether it can be said that at that moment she retained her New York ordinary residence. Accidental or casual breaks in a period of ordinary residence—for example, breaks for the purpose of business or holiday, such as were discussed in *Stransky* v. *Stransky*[46]—are an entirely different matter. Here we have a case of a woman who quite deliberately, with the knowledge and consent of her husband, left the place where she was ordinarily resident, went abroad and obtained a certificate of residence in a foreign country in order to give jurisdiction to the courts of that country. I do not think it necessary for the purpose of this judgment to express any final opinion on this point, but I have the gravest doubts about it.

I will read the headnote of *Travers* v. *Holley*[47]: "A husband "and wife, shortly after their marriage in the United Kingdom "in 1937, went out to Sydney, New South Wales, taking with "them all their belongings, the husband believing that the "Commonwealth offered him better prospects. He invested "money in a business in Sydney which, however, collapsed on "the outbreak of war. For a time he worked on a sheep farm "in northern New South Wales, leaving the wife in Sydney,

[35] [1953] P. 246.
[36] 1951 S.C. 508.
[37] (1957) V.L.R. 17.
[38] [1953] P. 246.
[39] (1957) V.L.R. 17, 33.
[40] [1953] P. 246.
[41] [1957] P. 237.
[42] [1958] P. 71.
[43] [1958] P. 112.
[44] The Times, November 18, 1958.
[45] [1953] P. 246.
[46] [1954] P. 428; [1954] 3 W.L.R. 123; [1954] 2 All E.R. 536.
[47] [1953] P. 246.

"where a child had been born in 1938. Later, the husband "obtained a commission in the Australian forces, and subse-"quently transferred to the British forces.

"In August, 1943, the wife, alleging that she had been "deserted since August, 1940, filed a petition for divorce in the "Supreme Court of New South Wales, and was granted a decree "which was made absolute on November 13, 1944. The husband "was served with notice of the petition, but did not defend it, "and both husband and wife later remarried. In 1952 the "husband, whose second marriage had not proved to be satis-"factory, obtained a decree of divorce in the present action on "the ground that the Australian decree was invalid because at the "time it was granted neither husband nor wife was domiciled in "New South Wales, and the wife, by remarrying, had been "guilty of adultery. The wife appealed:

"Held (Jenkins L.J. dissenting) that the husband had "acquired a domicile of choice in New South Wales, and the "appeal should be allowed. It was therefore unnecessary to "decide whether the conduct of the husband in not defending the "wife's petition was conduct conducive to the wife's remarriage "and alleged adultery.

"Held, further (per totam curiam) that the courts of New "South Wales by section 16 (a) of the New South Wales Matri-"monial Causes Act, No. 14, 1899, and the English courts by "section 13 of the Matrimonial Causes Act, 1937, claimed the "same jurisdiction, and it would be contrary to principle and "inconsistent with comity if the courts of this county refused to "recognize a jurisdiction which mutatis mutandis they claimed "for themselves; and that even if, while in desertion, the hus-"band had reverted to his English domicile of origin the New "South Wales court would not be deprived of jurisdiction."

Of course, the only point in that case that concerns this judgment is whether or not, if the foreign statute gives relief to a wife or allows a wife to present a petition in exactly parallel circumstances or almost exactly parallel circumstances to those in which a wife is entitled to proceed here, although that court is not the court of the domicile, a decree pronounced by it is entitled to recognition here.

The all important question was dealt with very shortly by Somervell L.J.[48] and it was dealt with equally shortly by Jenkins L.J.[49] But Hodson L.J. discussed the matter in some detail, and I now turn to his judgment.[50] After reciting the existing law as to domicile being the test for recognition, he then refers to section 13 of the 1937 Act, the Matrimonial Causes (War Marriages) Act, 1944, and section 18 of the 1950 Act, and he proceeds: "It seems "to me, therefore, that Parliament has cut the ground from the "argument put forward on behalf of the husband. If English "courts will only recognize foreign decrees of divorce where the

[48] [1953] P. 246, 251.
[49] Ibid. 254.
[50] Ibid. 256.

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"parties are domiciled in the territory of the foreign court at the "time of the institution of proceedings, because that is the juris-"diction which they themselves claim, what is the situation when "the courts of this country arrogate to themselves jurisdiction "in the case of persons not domiciled here at the material date? "It must surely be that what entitles an English court to assume "jurisdiction must be equally effective in the case of a foreign "court."

It is, of course, on the rarest of occasions and with the utmost diffidence that one ventures even to whisper a word of difference from anything that falls from that learned Lord Justice. But I am inclined to think that he was perhaps a little hard on the courts when he used the phrase "when the courts of this country "arrogate to themselves jurisdiction." I venture to think that it would have been more apt to say that the courts of this country have imposed upon them by the legislature the duty of exercising jurisdiction in those cases.

Hodson L.J. then quotes Lord Watson in the *Le Mesurier*[51] case, and then goes on to say: "It seems that where it is "found that the municipal law is not peculiar to the forum "of one country but corresponds with a law of a second "country, such municipal law cannot be said to trench upon "the interests of that country. I would say that where, as "here, there is in substance reciprocity, it would be contrary "to principle and inconsistent with comity if the courts of this "country were to refuse to recognize a jurisdiction which "mutatis mutandis they claim for themselves. The principle "laid down and followed since the *Le Mesurier*[51] case must, "I think, be interpreted in the light of the legislation which "has extended the power of the courts of this country in the "case of persons not domiciled here."

Hodson L.J. in the later case of *Levett* v. *Levett and Smith*[52] stated that the effect of *Travers* v. *Holley*[53] was accurately summarized in these words: "It decides that this "court will recognize the right of foreign courts to encroach "upon the principle of domicile only to the extent to which "this court also does."

Travers v. *Holley*[53] dealt with recognition of a foreign decree pronounced in circumstances similar to those covered by the present section 18 (1) (*a*) of the Matrimonial Causes Act, 1950, as did *Carr* v. *Carr*.[54]

The subsequent cases of *Arnold* v. *Arnold*,[55] *Robinson-Scott* v. *Robinson-Scott*,[56] *Manning* v. *Manning*,[57] and *Gerrard* v. *Gerrard*[58] were more in the nature of section 18 (1) (*b*) cases, and undoubtedly extended the principle laid down in *Travers* v. *Holley*.[59]

[51] [1895] A.C. 517.
[52] [1957] P. 156, 161.
[53] [1953] P. 246.
[54] [1955] 1 W.L.R. 422.
[55] [1957] P. 237.
[56] [1958] P. 71.
[57] [1958] P. 112.
[58] The Times, November 18, 1958.
[59] [1953] P. 246.

It is not necessary to consider those cases in detail. Their essence is, in my opinion, to be found in the judgment of Karminski J. in *Robinson-Scott* v. *Robinson-Scott* [60]: "I "believe that the true question to be answered in this case is "whether the courts of this country can recognize a foreign "decree where, in fact, the wife was resident in the territory "of the foreign court for three years immediately preceding "the commencement of the proceedings there, even though "the jurisdiction of the foreign court was based on different "grounds. In my view this question has not yet been asked "or answered by our courts, and I am, therefore, without the "guidance of direct authority. Writing in December, 1951, an "eminent American jurist, Dean Erwin Griswold, used these "words: 'If the heavy hand of the *Le Mesurier* [61] case can be "'lifted—as to a point which was never decided in that case—"'the courts should have little difficulty in concluding that a "'common law state may properly recognize a foreign divorce "'granted under the factual circumstances where it would "'itself grant a divorce.' In 1953 the Court of Appeal in "*Travers* v. *Holley* [62] lifted the heavy hand of the *Le Mesur-"ier* [63] case, or at least mitigated its weight.

"In my view the correct answer to the question which I have "asked myself is this: where, in fact, there has been three "years' residence by a wife in the territory of the foreign court "assuming jurisdiction in a suit for dissolution, the English court "should accept that as a ground for exercising jurisdiction, "because it would itself accept jurisdiction on proof of similar "residence in England. It is not essential for recognition by this "court that the foreign court should assume jurisdiction on the "grounds laid down by section 18 of the Matrimonial Causes Act, "1950. It is sufficient that facts exist which would enable the "English courts to assume jurisdiction."

It was on this basis that recognition was given to the decrees of the foreign courts in whose jurisdiction the wife in each case had in fact been resident for over three years, although the jurisdiction of the foreign court by the law of that court depended on the last common residence of the parties (in *Arnold* v. *Arnold* [64] and *Manning* v. *Manning* [65]), the acquisition of a separate domicile by the wife (*Robinson-Scott* v. *Robinson-Scott* [66]) or the last common residence or the residence of the wife (*Gerrard* v. *Gerrard* [67]).

It follows, therefore, from those decisions that, provided that the wife in the present case had been ordinarily resident in New York for three years at the commencement of a suit by her there, this court would recognize a decree pronounced in such a suit,

[60] [1958] P. 71, 87.
[61] [1895] A.C. 517.
[62] [1953] P. 246.
[63] [1895] A.C. 517.
[64] [1957] P. 237.
[65] [1958] P. 112.
[66] [1958] P. 71.
[67] The Times, November 18, 1958.

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notwithstanding that the jurisdictional test in New York is one year's residence only.

Does it follow from that and from the fact that the New York courts would recognize the Mexican decree that that decree is entitled to recognition in this court? Giving to the decision in *Armitage* v. *Attorney-General* [68] its widest meaning, and assuming that the wife was still ordinarily resident in New York when she instituted the suit in Mexico, I am quite unable to see that it does.

Armitage's case [68] decides that this court will give recognition to a decree, wherever pronounced, which is recognized by the court of the domicile of the parties. In my judgment, it necessarily follows that this court will not recognize decrees which are not recognized by the court of the domicile, except, of course, decrees pronounced by this court itself in favour of a wife in the exercise of its jurisdiction under section 18 of the Act of 1950, and similar legislation and decrees pronounced by foreign courts in strictly analogous circumstances. Subject to those exceptions, the court of the domicile is still, in our law, the paramount authority. To the extent of those exceptions this court will recognize a decree pronounced by a court other than the court of the domicile. But apart from those exceptions there is nothing in the authorities which compels or indeed permits this court to recognize a decree which is neither pronounced by nor directly recognized by the court of the domicile.

This court is in the present case the court of the domicile. As such, it does not recognize the Mexican decree. It is, in my judgment, impossible to hold that a decree to which this court would not give direct recognition is owing to the interposition of a residential qualification of the wife in a third State entitled on account of such residential qualification to be recognized here.

The proposition advanced for the husband is that the test for recognition is now a dual one. Is the decree valid either by the law of the domicile or by the law of the place in which we recognize that the wife is concurrently entitled to proceed? If the answer to either of these questions is in the affirmative, then, it is said, the decree is entitled to recognition here. The proposition is, in my judgment, a wholly illegitimate extension of the principle of comity upon which the case of *Travers* v. *Holley* [69] and the subsequent cases turn. It is not difficult to frame an example to illustrate the impossibility of such an extension. Suppose a husband and wife domiciled in, say, Victoria, Australia. The wife goes off to New York and ordinarily resides there for over three years. She then goes to Mexico and obtains a decree there in similar circumstances to those in which the present wife obtained

[68] [1906] P. 135. [69] [1953] P. 246.

her decree. That Mexican decree is not recognized by the courts of the domicile, Victoria, but is recognized by the courts of the wife's residence, New York. In subsequent proceedings in the English courts the validity of the Mexican decree is called in question—for example, in proceedings as to legitimacy or inheritance after a subsequent marriage of one of the parties. This court would be faced with the position that the Mexican decree was not recognized by the court of the domicile but was recognized by the court of the wife's residence. Can it possibly be doubted that this court would hold, following the court of the domicile, that the decree was not entitled to recognition?

In my opinion, that is in all essentials the situation here. It is argued for the petitioner that from the point of view of public policy it is most undesirable that these parties should be regarded as single in New York and as married in England, and that by New York law another marriage by either should be permissible but would be considered bigamous here. So to hold, it is said, would create the sort of inconvenience, confusion and scandal which is referred to in so many of the authorities.

In so far as any complications of this sort have been caused by the legislature by creating exceptions to the general application of the test of domicile, the courts have but to apply the law as enacted. And, as I see it, the underlying principle of *Travers* v. *Holley* [69] and the subsequent decisions is that we should recognize here the validity of foreign decrees granted to wives by courts other than those of the domicile in the exercise of a jurisdiction strictly analogous to that exercised by this court under section 18. That jurisdiction is exercised for the protection of wives whose husbands have abandoned their domicile by desertion or through being deported, or of wives who have ordinarily resided within the jurisdiction for three years and may be said to be bona fide or genuinely resident. The circumstances of the present case are far different. The wife was never domiciled in Mexico and never had any ordinary bona fide or genuine residence there.

It may be nothing to the point that it is conceded by the husband that, if it had been he who had gone to Mexico and obtained a decree, such a decree, though recognized in New York, would certainly be invalid here. But, as I see it, to give effect to the petitioner's contention in the present case would merely be to make confusion worse confounded.

For any inconvenience, confusion and scandal which arise in the present case the parties have only themselves and their advisers to blame. Proceedings could have been validly instituted by either party in this court. Equally, as the law stands, the wife, if she had succeeded in proving her case, could in her New York action have obtained a decree which would have been valid

[69] [1953] P. 246.

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here. They chose instead to resort to Mexico. Hence this trouble.

In my judgment, this part of the petition (the prayer for a declaration) fails, and it will be dismissed.

Declaration refused.

Solicitors: *Theodore Goddard & Co.; The Queen's Proctor.*

J. B. G.

[COURT OF APPEAL.]

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1958 *Nov.* 28; *Dec.* 1, 2, 18.

Lord Evershed M.R., Lord Cohen and Sellers L.J.

BROWN *v.* JAMIESON AND ANOTHER.

Landlord and Tenant—Business premises (security of tenancy)—Decontrolled premises—Notice to quit—Validity—Notice given in November, 1956, *expiring November,* 1957*—Premises within Rent Acts when notice given—"Decontrolled" July,* 1957*—Landlord and Tenant Act,* 1954, *control applicable thereafter—Notice not in form prescribed by Act—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 24 (3) (*b*), 43 (1)*—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11, *Sch.* 4, *paras.* 2, 11.

After the service of a notice to quit on the tenants of premises within the Rent Acts comprising a shop with living accommodation, but before the notice had taken effect, the Rent Act, 1957, came into force and the premises were no longer subject to control under the Rent Acts; accordingly, section 43 (1) [1] of the Landlord and Tenant Act, 1954, ceased to apply to the tenancy and it came within the provisions of Part II of the Act of 1954. The notice to quit was in accordance with the terms of the tenancy and would,

[1] Landlord and Tenant Act, 1954, Part II "SECURITY OF TENURE FOR "BUSINESS, PROFESSIONAL AND OTHER "TENANTS," s. 23 (1): "Subject to "the provisions of this Act, this Part "of this Act [Part II] applies to any "tenancy where the property com-"prised in the tenancy is or includes "premises which are occupied by the "tenant and are so occupied for the "purposes of a business carried on by "him or for those and other pur-"poses."

S. 24: "(1) A tenancy to which "this Part of this Act applies shall "not come to an end unless ter-"minated in accordance with the pro-"visions of this Part of this Act; . . . "(3) Notwithstanding anything in "subsection (1) of this section,—(*a*) "where a tenancy to which this Part "of this Act applies ceases to be such "a tenancy, it shall not come to an "end by reason only of the cesser, . . . "(*b*) where, at a time when a ten-"ancy is not one to which this Part "of this Act applies, the landlord "gives notice to quit, the operation "of the notice shall not be affected "by reason that the tenancy becomes "one to which this Part of this Act "applies after the giving of the "notice."

Ss. 41 and 42 deal with the cases where a tenancy is held on trust and by a member of a group of companies respectively.]

S. 43 (1): "This Part of this Act "[Part II] does not apply— . . . (*c*) "to a tenancy where the property "comprised therein is let under a let-"ting to which the restrictions on the "obtaining of possession by the "landlord imposed by section 3 of "the Rent and Mortgage [Interest] "Restrictions (Amendment) Act, "1933, apply in relation to the "tenant, or would apply but for sub-"section (7) of section 12 of the In-"crease of Rent and Mortgage In-"terest (Restrictions) Act, 1920 . . ."

admittedly, have been valid if the tenancy had not come within the Act of 1954. The notice was not, however, in the form required by that Act and the statutory regulations made under it:—

Held (Lord Cohen dissenting), that as the premises had become decontrolled during the period of notice and had, thereafter, come within the provisions of Part II of the Act of 1954, the saving by section 24 (3) (*b*) of that Act applied, and the notice to quit was valid, notwithstanding that it was not in the statutory form. Section 24 (3) (*b*) was to be literally interpreted and was not limited in its application to cases where the application of Part II of the Act was exclusively attributable to a change in the facts relating to the premises which had taken place after the service of the notice.

Orman Bros. Ltd. v. *Greenbaum* [1955] 1 W.L.R. 238; [1955] 1 All E.R. 610 (affirming [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731) distinguished. Observations of Devlin J. ([1954] 1 W.L.R. 1520, 1525 and 1526) explained.

Semble. Although a "business tenant" formerly protected by the Rent Acts is entitled to the benefit of the Act of 1954 upon decontrol if his contractual tenancy is still subsisting at that date (and is not subject to a pending notice to quit), or if at the date of decontrol he was a statutory tenant, a tenant whose contractual tenancy was at that date subject to a pending notice to quit is deprived of protection under both the Acts of 1954 and 1957.

Per Lord Cohen. The ratio decidendi of *Orman Bros. Ltd.* v. *Greenbaum* (supra) was that, notwithstanding the generality of the language of section 24 (3) (*b*), it must be treated as limited in its operation to cases where the application of the Act of 1954 was exclusively attributable to a change of user of the premises since the service of the notice, or at any rate in matters of fact as distinct from the mere operation of legislation as respects the premises concerned.

APPEAL from Judge Cohen sitting at Stockton-on-Tees County Court.

On May 5, 1944, James Jamieson and Elsie Jamieson, his wife, became the tenants of Mrs. Hilda Brown (hereinafter called "the landlord") of premises known as "Park Lane Stores," 97, Yarm Road, Stockton-on-Tees. The premises consisted of a shop with living accommodation above it. The rent was 25s. per week and the tenancy was determinable by 12 months' notice by either side. On November 14, 1956, the landlord served on the tenants a written notice to quit the premises on November 16, 1957. The rateable value of the property was £40, and it was not disputed that, until the coming into force of the Rent Act, 1957,[2] the premises were within the scope of the Rent Acts. On

[2] Rent Act, 1957, s. 11: "(1) The "Rent Acts shall not apply to any "dwelling-house the rateable value "of which on November 7, 1956, ex-"ceeded, in the Metropolitan Police "District or the City of London £40, "elsewhere in England or Wales £30, "and in Scotland £40. . . . (4) "Nothing in the foregoing provi-"sions of this section shall affect the "operation of Part I of the Landlord "and Tenant Act, 1954. . . . (7) The "transitional provisions contained in "the Fourth Schedule to this Act "shall have effect in relation to "dwelling-houses which cease to be "subject to control by virtue of sub-"section (1) or (3) of this section; "and those subsections shall have "effect subject to the provisions of "paragraph 3 of Part I of the Fifth "Schedule to this Act."

S. 27: "(2) This Act shall come "into force on the expiration of the 11 (1)

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July 6, 1957, when that Act came into force, the premises were no longer subject to control under the Rent Acts, and section 43 (1) (*c*) of the Landlord and Tenant Act, 1954, thereafter ceased to apply to the tenancy, and Part II of the Act of 1954 became applicable. The landlord brought proceedings for possession but in the county court the tenants submitted that the notice, though in accordance with the terms of the tenancy and otherwise valid, was not in the form prescribed by the Landlord and Tenant (Notice) Regulations, 1954 (S.I. 1957, No. 1107), and that, therefore, it was ineffective to determine the tenancy. The county court judge gave judgment in favour of the tenants and the landlord appealed.

P. V. Baker for the plaintiff landlord.
L. A. Blundell for the defendant tenants.

In addition to the cases referred to in the judgments, the following were cited in argument: *Teasdale* v. *Walker*[3]; *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[4]; *The Olympic*.[5]

Cur. adv. vult.

December 18. LORD EVERSHED M.R. stated the facts and said: The question for the court is whether, by virtue of section 24 (3) (*b*) of the Landlord and Tenant Act, 1954, the notice to quit took full effect so as to determine the tenants' right of occupation on its expiry on November 16, 1957; or whether, since the notice did not satisfy the requirements of the Act of 1954 and the regulations thereunder, the defendants' tenancy still subsists and will continue so to do until determined in due accordance with the last-mentioned Act and regulations.

"period of one month which begins "with the date of the passing "thereof."

Fourth Sched., para. 2: "(1) "Where immediately before the time "of decontrol the dwelling-house was "the subject of a statutory tenancy "or of a controlled tenancy which "would or might come to an end "within 15 months of that time by "effluxion of time or notice to quit, "the tenant under that tenancy shall "be entitled until the date herein-"after mentioned, and subject to the "following provisions of this Schedule "to retain possession of the dwelling-"house in the like circumstances, to "the like extent and subject to the "like provisions (including in particu-"lar provisions as to recovery of "possession by the landlord) as if the "Rent Acts had not ceased to apply "to the dwelling-house. . . . (6) This "paragraph shall not apply to a "tenancy to which, immediately after "the time of decontrol, Part II of "the Landlord and Tenant Act, 1954, "applies. . . ."

Para. 11: A statutory tenancy "which, immediately before the "time of decontrol, was one to which, "but for paragraph (*c*) of subsection "(1) of section 43 of the Landlord "and Tenant Act, 1954, Part II of "that Act would have applied if it "had been a tenancy within the "meaning of that Act, shall after the "time of decontrol be deemed for the "purposes of that Act to be a tenancy "to which Part II thereof applies, "being a tenancy continuing by "virtue of section 24 of that Act after "the expiry of a term of years cer-"tain, and accordingly paragraph 2 "of this Schedule shall not apply "to it."

[3] [1958] 1 W.L.R. 1076, 1085; [1958] 3 All E.R. 307, 314.

[4] [1933] A.C. 402; 49 T.L.R. 391.

[5] [1913] P. 92; 29 T.L.R. 335.

[His Lordship read section 24 of the Landlord and Tenant Act, 1954, as set out above, and continued:] Upon a first reading of paragraph (*b*) of subsection (3) it would appear precisely to cover the present case. At a time when the defendants' tenancy was not one to which Part II of the Act of 1954 applied, the plaintiff landlord had given a notice to quit, fully complying with the contract of tenancy. It follows, therefore, according to the argument on the landlord's behalf, that "the operation of the "notice" (which must mean its effect to determine the tenancy) is not affected by the circumstance that, after the giving of the notice, but before its expiry, Part II of the Act of 1954 became applicable to the tenancy.

The judge in a reserved judgment rejected the plaintiff's claim. His conclusion was based on certain decisions of the courts and particularly on the decision of this court in *Orman Bros. Ltd.* v. *Greenbaum*,[1] affirming the judgment of Devlin J.,[2] as binding him to hold that section 24 (3) (*b*), notwithstanding the generality of its language, must be treated as limited in its operation to cases where the application of the Act of 1954, after the giving of a notice to quit, is exclusively attributable to a change of user of the premises since that date; or at any rate to matters of fact as distinct from the mere operation of legislation as respects the premises concerned.

The plaintiff landlord has appealed from the judge's rejection of his claim. In the circumstances, the first question for our consideration is: What is the true scope and effect of the *Orman* decision[3]? There is no doubt that the facts in that case differed from those in the present case in this material respect, that in the former, the notice to quit, though given after the Act of 1954 had received the Royal Assent, was given before, but expressed to take effect after, the Act came into operation. In *Orman's* case,[3] therefore, the reason for the non-application of the Act of 1954 at the date of the notice did not depend upon the premises in question being, by reason of the particular facts or circumstances relating to them, excluded from the Act's operation so long as those facts or circumstances were unchanged; but depended on the single circumstance that at such date the Act itself had not come into operation at all.

In the view of Devlin J.[4] the words "at a time when a "tenancy is not one to which this Part of this Act applies" in section 24 (3) (*b*) clearly carry with them the implication that at the relevant time (that is, the date of the giving of the notice) the Act of 1954 is already in force—an implication plainly inherent (I may add) in the language of paragraph (*a*) of the same subsection. In this court Lord Goddard C.J., in giving the leading judgment, described Devlin J.'s judgment as "entirely right and

[1] [1955] 1 W.L.R. 248; [1955] 1 All E.R. 610.
[2] [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731.
[3] [1955] 1 W.L.R. 248.
[4] [1954] 1 W.L.R. 1520, 1525.

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"impeccable."[5] The view of Devlin J. which I have quoted, affirmed in this court in the language which I have also cited—a view with which I respectfully most fully concur—was sufficient to determine *Orman's* case,[6] but would have no decisive effect in the present action; since in this case the Act of 1954 was in force at the date of the giving of the notice by the landlord on November 14, 1956. But did Devlin J.'s decision and its affirmation go further? Can it be said that its ratio or one of its rationes was that which I have attempted to express above, namely, that section 24 (3) (*b*) is limited in its operation to cases where the application of the Act of 1954 to the premises after the date of the notice (but before its expiry) depends upon a change of user of the premises? The proposition which, according to Mr. Blundell for the tenants in this court, is enshrined and inherent in the decision in *Orman's* case,[6] was expressed by him as follows: The words in the subsection "the tenancy becomes one to which "this Part of this Act applies" refer not to the moment when the Act of 1954 becomes operative as a matter of law as respects that tenancy, but to a change in the physical circumstances as to user, etc., which determine whether a tenancy is a "business "tenancy" to which Part II of the Act applies. The words "et cetera" are inserted in his formula by Mr. Blundell for the purpose of making allowance for the possible effects of the provisions of sections 41 and 42.

Mr. Blundell's argument depends first upon two passages in Devlin J.'s judgment: and since, as I have earlier stated, Lord Goddard C.J. described that judgment as "entirely right and "impeccable," it is necessary to set out those two passages in full. The first is[7]: "That is subject to Mr. Sherrard's alter-"native argument, which is, that if he is caught by sub-"section (1)"—that is, of section 24—"then he is taken out of "it by subsection (3). I think the object of that subsection is "clear enough. It is not intended merely as a transitional "provision to cover notices to quit that are served before the "coming into force of the Act; it is intended as a permanent "provision of the Act, and its object is to meet with the "situation in which there is a change of user between the serving "of the notice and its taking effect, a change of user which might "bring the tenancy within the the Act. Thus, if instead of "reading 'tenancy is not one to which this Part of this Act "'applies,' I call it, not precisely but no doubt for general "purposes sufficiently accurately, a 'business tenancy,' the "subsection would read in this way: 'where, at a time when a "'tenancy is not a business tenancy, the landlord gives notice to "'quit, the operation of the notice shall not be affected by reason "'that the tenancy becomes a business tenancy after the giving "'of the notice.' That is a plain, simple and no doubt necessary "provision."

[5] [1955] 1 W.L.R. 248, 250.
[6] [1955] 1 W.L.R. 248.
[7] [1954] 1 W.L.R. 1520, 1525.

Then later on the same page and immediately after his expression of the view which I earlier cited in this judgment, Devlin J. continued: "It is perfectly true, of course, that the Act does not "apply to any tenancies before October 1, or, at any rate, before "July 30, but that division in time is not what is intended by "this subsection. The subsection intends a division in character, "and I think Mr. Lawson is right in his argument when he "says that when one is applying that subsection at a time when "a tenancy is not one to which this Part of this Act applies, one "has to assume that the Act itself is already in force and "applying, and then consider whether in its terms it does or does "not cover that particular class of tenancy."

It will be observed from the opening words of the earlier of these two passages that, in them, Devlin J. was dealing only with an alternative argument put before him on the landlord's behalf. Neither of the two passages was in terms cited in the judgments on the appeal in this court. The alternative argument in question was dealt with by Lord Goddard C.J. in the short paragraph at the end of his judgment where he said [8]: "The only other "point on which it is necessary to say a word is this: Mr. "Wilson's submission was that if we were against him on the "point which I have just decided, the position is saved for him "by section 24 (3). The judge thought that that subsection quite "clearly meant that if the tenancy was, say, of a private house "to which Part II did not apply at all, and notice to quit that "house was given, such notice would remain good and effective "although before it became effective the house had been turned "into a shop, and therefore would otherwise be the subject of "Part II of the Act. That view is one with which I entirely "agree. I think that Devlin J.'s judgment was perfectly right, "and that this appeal fails." Singleton L.J. confined himself to concurrence with Lord Goddard C.J., and I find nothing pertinent to the point now in question in the judgment of Romer L.J.—save that he, too, expressed agreement with Lord Goddard C.J. I do not, however, forget that Lord Goddard both at the beginning and at the end of his judgment expressed entire concurrence with Devlin J.'s judgment.

How far, then, to pose again the essential question already formulated, must the language of Devlin J. be taken to amount to an exegesis of the subsection, in the sense for which Mr. Blundell contends, binding upon this court by reason of this court's affirmation of the judgment in its entirety?

I first observe that in strictness the question, as it is now sought to be formulated, was not necessary to Devlin J.'s conclusion. I observe also, for what it is worth, that there is neither in the recital of the facts in the report of 1954, nor in Devlin J.'s judgment itself, any precise statement of the nature or circumstances of the tenants' business, as might (I think) have been

[8] [1955] 1 W.L.R. 248, 253.

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expected had Devlin J. intended to found himself on the interpretation of the subsection attributed to him. We are told that the premises in question were factory premises, and that the tenancy was a business tenancy. But that is all. True, the judge paraphrased the subsection by substituting the words "business "tenancy" for the longer statutory formula. But the paraphrase was after all not expressed as intended to be precise. Likewise, Devlin J. had qualified his rejection of the view of the subsection as a "transitional provision" by the use of the adverb "merely" in the phrase "merely as a transitional provision to cover notices "to quit that are served before the coming into force of the "Act."[9] And in the same way Lord Goddard C.J.'s exposition is shown to be illustrative by his use of the word "say."[10] It seems to me that both Devlin J. and Lord Goddard C.J. were illustrating the real basis of their conclusion—namely, that the subsection was intended, and only intended, to apply where, the Act of 1954 having been in force at all relevant times, its partial application depended upon some change in the situation or status of the premises—by reference to the most obvious case of the change arising from a change of user. But I have in the end, and with a hesitation proper to the circumstance that Lord Cohen has formed a contrary view, come myself to the conclusion that it would not (in the absence of some other compelling reason) be right to treat those judgments as laying down a far-reaching interpretation of the subsection upon a point not necessary to their decision, and thereby of substituting for the Parliamentary language some wholly different terms.

For that would be the effect of accepting Mr. Blundell's argument. It would mean that henceforth the subsection must be interpreted by the courts as though it had read: "where, at a "time when a tenancy is not a business tenancy, the landlord "gives notice to quit, the operation of the notice shall not be "affected by reason that the tenancy becomes a business tenancy "after the giving of the notice." But that is not the language which Parliament has enacted. Had Parliament intended so to enact, there would clearly have been no difficulty in so doing. I cannot for myself think that (unless, again, there is some compelling reason for so doing) we ought now to hold that Devlin J. in 1954, and the Court of Appeal in 1955, intended so rigidly to interpret (and require thereafter to be interpreted) the apparently simple language of the Act—and so by anticipation to determine the question which has now arisen but which was not then at all before them. I add that I cannot get additional authority for so doing from the use of the words "and applying" in the final sentence of the second of the two passages which I have quoted above from Devlin J.'s judgment.[11]

Is there then some other compelling reason for so interpreting and limiting the subsection? Mr. Blundell raised a formidable

[9] [1954] 1 W.L.R. 1520, 1525.
[10] [1955] 1 W.L.R. 248, 253.
[11] [1954] 1 W.L.R. 1520, 1525.

point before us on the Fourth Schedule to the Rent Act, 1957. That schedule contains (expressly) transitional provisions taking effect by virtue of section 11 (7) of the Act in cases of decontrol under the earlier terms of that section—provisions designed to give a measure of temporary protection to the tenant whose premises become decontrolled. Paragraph 2 (6) provides that this transitional protection is inapplicable to a tenancy to which, immediately after the decontrol, Part II of the Act of 1954 is applicable. Paragraph 11 of the same schedule is referable to the case where a formerly controlled contractual tenancy under the Rent Acts has been determined so that the tenant was a "statutory tenant" upon decontrol, but where his tenancy is a business tenancy to which the Act of 1954 would, apart from the Rent Restriction legislation, have been applicable. In this case, too, the tenant is treated as having the protection of the Act of 1954 from the moment of decontrol, and he is therefore excluded from the operation of the transitional provisions in the Fourth Schedule to the Act of 1957. Mr. Blundell pointed out, therefore, that the "business tenant" formerly protected by the Rent Restriction legislation is entitled to the benefit of the Act of 1954 upon decontrol if his contractual tenancy is still subsisting at that date (and not the subject of a pending notice to quit) and, also, if his contract had been determined prior to the date of decontrol. The anomalous case is that of a tenant whose contractual tenancy was subject to a notice to quit pending at the date of decontrol; since (as Mr. Blundell contends) if his argument is not accepted, that tenant, and that tenant alone, would be deprived of any protection, upon decontrol, equally under the Act of 1954 and the Act of 1957.

And the anomaly is made all the more striking by the provision, in section 27 (2) of the Act of 1957, that it should come into force at the expiration of one month beginning with the date of its passing—a period sufficient to enable any landlord, sufficiently astute to notice the anomaly, to serve upon his tenant a notice to quit expiring after the month.

It was Mr. Blundell's submission that Parliament, in enacting the Act of 1957, and, in particular, its Fourth Schedule, must be taken to have proceeded on the view that the decision in *Orman's* case [12] avoided the anomaly. There is no doubt authority for the view that Parliament must be treated as being acquainted with the state of the law as established by the courts' decisions. Thus, if a particular formula has been interpreted by the courts, Parliament may be assumed, if it re-enacts that formula, to have intended its interpretation to be that previously given to it by the courts. (See Maxwell on Interpretation of Statutes, 10th ed., p. 313, and cases there cited.) But Mr. Blundell's submission in the present case seems to me to go far beyond the warrant of any such authority; for it involves that Parliament, in enacting the

[12] [1955] 1 W.L.R. 248.

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Fourth Schedule to the Act of 1957, deliberately omitted any provision relative to the case of a tenancy becoming decontrolled in respect of which a notice to quit was pending at the date of decontrol, in reliance upon a decision in a case in which that set of facts did not at all arise.

I am, therefore, unable to accept the contention that the Act of 1957 involves legislative recognition of the view of the *Orman* decision [13] for which Mr. Blundell has argued. The question was also raised whether section 24 (3) (*b*) could be interpreted as meaning that the notice to quit was effective only to determine the contractual tenancy (in such a case as the present) so as to leave the defendants in the position of "statutory business "tenants" entitled to receive a further notice to quit in accordance with the Act of 1954 and regulations before their right of occupation was put an end to. But if this point were correct, it would apply equally, so far as I can see, in what I have called the "obvious" case taken by Devlin J. of a residential tenant adopting a business user after the receipt of the notice to quit. This attempted solution of the difficulty equally, therefore, in my judgment, fails.

Certain other cases were referred to in the argument, and in the judgment of the judge; but I do not further refer to them since none of them, in my view, assists in the determination of the present appeal. The sole question, therefore, that remains is the question earlier posed—What is in truth the effect of the decision in *Orman's* case? [14] There is beyond doubt a strong case on grounds of common sense and common justice for avoiding the anomaly of which, if Mr. Baker's argument prevails, the plaintiff is here entitled to take advantage. It may well be supposed that the legislature, if the point had been present to its mind, would not have intended such anomaly. But it is not the function of the court to improve upon the Parliamentary performance. If, upon the true construction of the relevant Acts, the anomaly is there, the courts cannot legislate to make good the omission.

I have already indicated my reasons for being unable to accept the view of the *Orman* decision [14] for which Mr. Blundell contends. I add one further consideration. If Mr. Blundell's argument is to prevail, then, so far as I can see, Devlin J. must be taken to have based his conclusion on two distinct and independent grounds, namely, (1) that the words in the subsection "tenancy "is not one to which . . . this Act applies" mean a tenancy that is not a "business tenancy," and (2), that the words "at a time "when . . ." etc., carry the implication that at the relevant time the Act of 1954 is already in force. The two suggested grounds are, as I have said, wholly independent, for the one in no sense follows from the other. Each, of itself, would have been sufficient to dispose of *Orman's* case [14]; only the first has a decisive effect in the present case.

[13] [1955] 1 W.L.R. 248. [14] Ibid.

I can see no trace in his judgment that Devlin J. thought that he was founding himself upon two distinct lines of reasoning. As I read his judgment the judge was rather expounding a single answer to the argument of the landlord's counsel; and if the first suggested ground is treated (as I have earlier indicated) as illustrative of the second, then the two become complementary and coherent. If the first suggested ground was intended as distinct and independent, then it seems to me surprising that (as I have said) there should have been such extremely slender reference made to the actual user of the premises. What I have said applies with equal force, in my judgment, to the judgment of Lord Goddard C.J.

For these reasons I have felt, after much hesitation and with some feelings of regret, forced to the conclusion that *Orman's* case [15] does not now bind us to accept the conclusion of the county court judge. It follows that, construing section 24 (3) (*b*) unaided by authority, I would hold that it means what it says, and would allow this appeal.

LORD COHEN, having stated the facts, continued: It is common ground that throughout the tenancy the male tenant, either himself or by one of his children, has carried on business on the premises. The premises were therefore business premises which would have been within the ambit of Part II of the Landlord and Tenant Act, 1954, when that Act came into force, had it not been for the provisions of section 43 (1) (*c*) of the Act. [His Lordship read paragraph (*c*) and continued:] It is admitted that the premises fell within this exception and it follows that when giving the notice to quit of November 14, 1956, the landlord did not have to comply with the requirements of the Landlord and Tenant Act, 1954. On July 6, 1957, however, the Rent Act, 1957, came into force, and under section 11 (1) of that Act the tenant ceased to be entitled to the protection of the Rent Restrictions Acts and would, accordingly, have been bound to give up possession on November 16, 1957, unless he could claim protection either under Part II of the Landord and Tenant Act, 1954, or under the transitory provisions of the Rent Act which are to be found in the Fourth Schedule to that Act. He did not give up possession, and on March 26, 1958, the landlord commenced these proceedings. On June 16, 1958, the county court judge dismissed the claim on the ground that, although the contractual tenancy between the parties had come to an end, the tenants were still entitled to retain possession until their right was determined by a notice to quit which complied with the provisions of the regulations made under the Landlord and Tenant Act, 1954.

In order to make clear the issues between the parties I must now refer to the relevant provisions of the Landlord and Tenant Act, 1954, Part II. [His Lordship read section 23 (1) and

[15] [1955] 1 W.L.R. 248.

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referred to section 24 (1) and (3) (*b*). He continued:] I pause here to observe that this last subsection is the one on which the determination of the issues between the parties mainly depends. I must, however, refer briefly to one or two other provisions. Section 25 (1) provides for the method of determination of tenancies to which Part II of the Act applies. Section 43, which I have already mentioned, provides that the Act is not to apply to certain classes of tenancy, including a tenancy of an agricultural holding, a tenancy created by a mining lease, and, as I have already said, a tenancy protected by section 3 of the Rent and Mortgage Restrictions (Amendment) Act, 1933.

Returning to section 24 (3) (*b*), the landlord's argument is short and, at first sight, very attractive. He says the language of the section is plain and unambiguous. The notice to quit was given at a time when the tenants held under a tenancy which was not one to which Part II of the Landlord and Tenant Act, 1954, applied; the operation of the notice was therefore not affected by the fact that on the coming into force of the Rent Act, 1957, the tenancy became one to which Part II of the Landlord and Tenant Act, 1954, applied; effect can only be given to this provision by holding that on the expiry of the notice the relation between the parties was brought to an end.

Had the matter been free from authority I should, I think, have been inclined to accept this argument, but the matter is not free from authority, and Mr. Blundell, for the tenants, submits that the section only assists a landlord where the tenancy has become a tenancy to which Part II applies, not as the result of an alteration in the law, but by reason of some change in physical circumstance such as a change of the user of the premises. This was the argument accepted by the county court judge, and it is based mainly on the decision of Devlin J. in *Orman Brothers Ltd.* v. *Greenbaum.*[16] That decision was affirmed by the Court of Appeal[17] but, as Lord Goddard C.J., delivering the leading judgment, said that he agreed completely with the judgment of Devlin J., it will be sufficient if I refer to the decision in the lower court. In that case the premises were business premises which were clearly within the ambit of Part II of the Landlord and Tenant Act, 1954. At the time when the notice to quit was given, that Act did not apply to the premises, not because of section 43 of the Act, but because the Landlord and Tenant Act, 1954, had not come into force. The plaintiff contended that section 24 (3) (*b*) applied, but the judge rejected this submission. The first material passage of his judgment[18] has already been read by my Lord, and I need not repeat it. That passage seems to me to be the judge's exposition of the section. In describing his use of the term "business tenancy" as not precise, the judge had in mind, I think, the reference in section 23 (1) to

[16] [1954] 1 W.L.R. 1520.
[17] [1955] 1 W.L.R. 248.
[18] [1954] 1 W.L.R. 1520, 1525.

premises (and I quote from the subsection): "occupied for the "purposes of a business carried on by him or for those and other "purposes."

The judge then sets out Mr. Sherrard's argument to the contrary. That was not read by my Lord, and I now read it.[19] "But Mr. Sherrard argues that whatever the object of the sub-"section may be, the language is wide enough for his purposes "and he can use it as, so to speak, a transitional provision. "He seeks to apply it in this way: As to the first part of sub-"section (3) (*b*)—'where, at a time when a tenancy is not one "'to which this Part of this Act applies, the landlord gives "'notice to quit'—he says the landlord gave notice to quit on "August 31 and the tenancy, although a business tenancy, was "not then one to which this part of the Act applied, because the "Act did not apply to any tenancy at all, not having come into "force until October 1. Accordingly, he comes within the sub-"section and he then says: As to the second part of the para-"graph—'the operation of the notice shall not be affected by "'reason that the tenancy becomes one to which this Part of "'this Act applies after the giving of the notice'—the "'becoming' in his case is the coming into force of the Act which "affects the tenancy."

The judge then proceeds to explain why he rejects Mr. Sherrard's argument. I need not read the passage in which he does so, as the material portions of it were read by my Lord. In it, as I read his judgment, the judge no doubt emphasizes that the words "at a time when the tenancy is not one to which this "Part of the Act applies" carry with them the implication that at the time when one is considering the matter the Act of 1954 is in force, but he is doing so not, I think, in order to make this the basis of his decision, but rather to reinforce the conclusion he had stated in the first passage I have cited from his judgment.

Mr Baker, for the landlord, does not dispute that the object of section 24 (3) (*b*) may have been to deal with the situation in which there is a change of user between the serving of the notice and its taking effect, a change of user which might bring the tenancy within the Act. He argues, however, that to deal with this situation Parliament has used language which plainly covers other situations, such as the one which has arisen in the case now before this court, and that there is no justification for cutting down the natural meaning of the language used.

Reading the judgment of Devlin J. as a whole, I am unable to accept this argument. I think that by emphasizing that the subsection is not intended as a transitional provision and by restating the section as meaning "where at a time when a "tenancy is not a business tenancy the landlord gives notice to "quit, the operation of the notice shall not be affected by reason "that the tenancy becomes a business tenancy after the giving

[19] [1954] 1 W.L.R. 1520, 1525.

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"of the notice," the judge was indicating his ratio decidendi to be as follows: (1) The plain policy of Part II of the Act was to protect tenants of business premises; (2) This policy would be defeated unless some limitation is placed on the apparently wide meaning of the language used in section 24 (3) (*b*); (3) The appropriate limitation is that indicated in his (the judge's) rewriting of the section. That ratio decidendi was approved in this court, and I think we are bound, as was the county court judge, to hold that the tenancy envisaged by the Act of 1954 has not come to an end.

The county court judge also referred to the decisions of Sellers J. in *Castle Laundry (London) Ltd.* v. *Read*[20] and of Harman J. in *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[21] The facts of those cases are different from those in the present case and I cannot derive much assistance from them, but it is perhaps worth observing that Sellers J. recognized in the *Castle Laundry* case[22] the possibility that a contractual tenancy of premises might be terminated but the business tenancy under the Act might continue until determined in accordance with the regulations made thereunder.

Mr. Blundell sought to reinforce his argument by indicating the anomalous position that would arise if the appeal were to succeed. He called our attention to the following provisions of the Rent Act, 1957, s. 11 (4) (7) and Sched. 4, paras. 2 (1) (6) and 11. Section 11 (4) provides that "Nothing "in the foregoing provisions of this section"—which is the section releasing from control under the Rent Acts a large number of properties—"shall affect the operation of Part I of the Landlord and Tenant Act, 1954." Subsection (7) of section 11 refers to the transitional provisions set out in the Fourth Schedule to the Act. I do not think I need refer in detail to the provisions of paragraph 2 of that Schedule. It is sufficient to say that paragraph 2 (1) deals with the case of dwelling-houses and sub-paragraph (6) provides: "This paragraph shall not apply to a "tenancy to which, immediately after the time of decontrol, "Part II of the Landlord and Tenant Act, 1954, applies." Paragraph 11 is the one which deals with statutory tenancies and gives some measure of protection to statutory tenants.

The effect of these provisions is to show an intention not to interfere with the operation of the Landlord and Tenant Act, 1954, and to ensure a measure of protection during a transitional period to all tenants of decontrolled dwelling-houses and to tenants of decontrolled business premises where the tenancy was still in force and no notice of determination had been given or where the tenant was a statutory tenant. As Mr. Blundell said, it would indeed be anomalous if a tenant whose

[20] [1955] 1 Q.B. 586; [1955] 2 W.L.R. 943; [1955] 2 All E.R. 154.

[21] [1958] Ch. 437; [1958] 2 W.L.R. 1; sub nom. *In re Bleachers Association's Leases, Weinbergs Weatherproofs* v. *Radcliffe Paper Mill Co. Ltd.* [1957] 3 All E.R. 663.

[22] [1955] 1 Q.B. 586, 592.

tenancy of business premises had been the subject of a notice to quit which had not expired should be in a worse position than a statutory tenant of similar premises. He submitted that the language of section 24 (3) is ambiguous and that Parliament must be taken to have known of the decision of this court in *Orman Brothers Ltd.* v. *Greenbaum* [23] and to have enacted the Rent Act, 1957, on the basis of that decision, as Mr. Blundell interpreted its ratio decidendi. He relied on the observations of Denning L.J. in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell*,[24] which read as follows: "The true view is that the court will be slow to "overrule a previous decision on the interpretation of a statute "when it has long been acted on, and it will be more "than usually slow to do so when Parliament has, since the "decision, re-enacted the statute in the same terms." I am unable, however, to derive help from these observations in deciding the present case, since I cannot find that the decision in *Orman's* case,[25] based on different facts, has long been acted on; nor can I agree that the language of section 24 (3) (*b*) is ambiguous.

I return, therefore, to section 24 (3) unassisted by any inference from the passing of the Rent Act, 1957. The language of the subsection is, as I have said, unambiguous, and it is indeed couched in such wide terms that read literally the decision in *Orman's* case [25] should have been the other way. I am compelled, however, by that decision to place some limitation on it. Lord Evershed M.R. has suggested that the only limitation necessary is that the Act of 1954 should have been in force at all relevant times. I agree that that is a possible construction, but I am unable to agree that it was the ratio decidendi adopted by Devlin J. and the Court of Appeal in *Orman's* case.[25] On the contrary, I think that their ratio decidendi was, to adopt the language of Lord Evershed M.R., that "notwithstanding the "generality of its language" the subsection "must be treated as "limited in its operation to cases where the application of the "Act of 1954 is exclusively attributable to a change of user of "the premises since that date or at any rate to matters of fact "as distinct from the mere operation of legislation as respects the "premises concerned."

Sitting in this court, I am bound by the ratio decidendi in *Orman's* case,[25] a position that I welcome as it enables me to avoid the anomaly which, as Lord Evershed M.R. has so clearly pointed out, would arise from allowing the appeal in the present case.

I would dismiss the appeal.

SELLERS L.J. The Landlord and Tenant Act, 1954, by section 24 (1), provides that a tenancy to which Part II of the Act applies (which is a business tenancy within the meaning

[23] [1955] 1 W.L.R. 248.
[24] [1949] 2 K.B. 417, 429.
[25] [1955] 1 W.L.R. 248.

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ascribed by the Act) shall not come to an end unless terminated in accordance with the provisions of the Act.

It has been held by this court in *Orman's* case,[26] accepting the judgment of Devlin J., that that provision has to be interpreted literally. It was put this way by the trial judge in the case: "If one applies that literally, the position is this: One has to ask "oneself: On October 5, did this tenancy come to an end? The "Act is then unquestionably in force. It is then a tenancy to "which this part of the Act applies, because it is a business "tenancy. Has it come to an end? It does not come to an end "unless notice to quit has been given in accordance with the "provisions of the Act, and notice to quit has not been given in "accordance with the provisions of the Act and, therefore, the "tenancy does not come to an end. That is the literal interpreta-"tion of the section."

In the present case, after the Rent Act, 1957, became law, but not before, the premises the subject-matter of this action were released from the exclusion from the operation of the Landlord and Tenant Act, 1954, up till then given by section 43 (1) (*c*) of that Act, and they were then business premises within the Act's definition and fell within section 24 (1).

But section 24 (3) provides that, notwithstanding anything in subsection (1) of section 24, "(*b*) where, at a time when a tenancy "is not one to which this Part of this Act applies, the landlord gives "notice to quit, the operation of the notice shall not be affected "by reason that the tenancy becomes one to which this Part of "this Act applies after the giving of the notice." The facts of this case seem to me to fall entirely under that subsection if it is read literally. On that view, when the landlord gave the notice to quit on November 14, 1956, the tenancy was not one to which Part II of the Act applied; the operation of the notice was not affected, therefore, by reason that before it expired on November 16, 1957, the tenancy had become one to which Part II of the Act had come to apply after the giving of the notice.

That is the view urged on us by the argument for the landlord, and it is a view to which, I think, the language of the subsection commits one unless such a literal construction is not open to this court by reason of the previous decision of *Orman's* case.[27]

As both my Lords have pointed out, a literal construction may lead to anomalous and perhaps unintended results, but when a statute does produce clear and unambiguous language it scarcely seems open or desirable to endeavour to hold that it does not mean what it says.

The difficulty in the case is to decide whether the construction of subsection (3) (*b*) for which the landlord contends can now be accepted and held by this court. It may be that Devlin J. was restricting subsection (3) (*b*) to what he calls a division in character of the premises. But although Lord Goddard C.J.

[26] [1955] 1 W.L.R. 248. [27] Ibid.

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accepted that judgment he appears, when himself referring shortly to section 24 (3) (*b*), to treat the judge's view as an illustration only of the subsection's application.

I have felt real difficulty in arriving at a conclusion on this matter, particularly as Lord Cohen takes a different view from Lord Evershed M.R., but on the facts of this case, differing as they do from those in *Orman's* case,[27] and on the careful analysis of the reasoning in that case which Lord Evershed M.R. has made, I think this court is free to express its own construction of the subsection. If free, I would apply a literal construction to both section 24 (1) (as was done in *Orman's* case [27]) and section 24 (3) (*b*), and so doing, I would hold that the landlord's notice to quit was effective to terminate the tenancy. I would, therefore, allow the appeal.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Johnson, Wetherall & Sturt for Barugh & Wilkinson, Middlesbrough; Tarry, Sherlock & Co. for Cohen, Jackson & Scott, Stockton-on-Tees.*

E. D.

[CHANCERY DIVISION.]

In re No. 1, ALBEMARLE ST.

[1957 T. No. 1289.]

1958
Dec. 11, 12, 15.
Upjohn J.

Landlord and Tenant—Business premises (Security of tenure)—Terms of new tenancy—Collateral term—Right to display advertising signs under existing tenancy—Whether term of tenancy—Whether right to be included in new lease—Jurisdiction of court—Landlord and Tenant Act, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 35.

Business premises in a building in Albemarle Street, Piccadilly, were let to the applicants for a term of 21 years by a lease expiring on December 25, 1957.

By clause 7 of the lease the lessors authorized and permitted the lessees to maintain during the continuance of the lease "the "advertising signs . . . in their present position facing Piccadilly and Albemarle Street outside the building of which the "demised premises form part . . . " On the outside of the building there were, and had been since before the lease came into being, four signs advertizing a product of the applicants.

On an application for a new tenancy under section 24 of the Landlord and Tenant Act, 1954, the respondents did not challenge the applicants' right to a new tenancy but objected to the continuance of the advertising signs and contended that the court had no jurisdiction to include a clause such as clause 7 in a new lease ordered to be granted under section 29 of the Act; alternatively, that if there were such jurisdiction, it was not a case in which it should be exercised:—

Held, that although the right to exhibit signs set out in clause 7 of the current lease was not a term which touched or

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concerned the land demised but was a mere licence, there was nevertheless jurisdiction under section 35[1] of the Landlord and Tenant Act, 1954, which gave the court the widest possible discretion and entitled it to look at all the terms of the current tenancy agreement and all the relevant circumstances to make an order for a new lease including such a right.

Held, further, on the facts, that it was a case in which the court should exercise its discretion in favour of the applicants, and, accordingly, the new lease ordered to be granted should contain a clause in the same terms as clause 7.

Adjourned summons.

The applicants, the Triplex Safety Glass Company Ltd., lessees of business premises consisting of the second floor of No. 1, Albemarle Street, Piccadilly, London, W.1, applied to the court by originating summons under section 24 of the Landlord and Tenant Act, 1954, for an order for the grant by the respondents, Volito Managements Ltd., of a new tenancy of the premises for a period of 14 years from the termination of the current tenancy at a rent of £4,500 per annum, and upon the same terms as the current tenancy, or, alternatively, for such period and for such rent and upon such terms as the court might determine.

The following facts are taken from the judgment of Upjohn J.: The lease, dated March 25, 1937, was a demise of the second floor of No. 1, Albemarle Street, Piccadilly, in the County of London, for a term of 21 years expiring on December 25, 1957, at an inclusive rent of £2,270 plus certain charges for cleaning, heating and lighting services. That lease was continued under the provisions of section 24 of the Landlord and Tenant Act, 1954, but in fact the respondents gave a notice under the Act, terminating the lease on December 25, 1957. The original lessors were the District Bank, Limited, and a Mr. Herbert Roper Barrett, but the freehold reversion was now vested in the second respondent, one Slazenger, who has granted a lease of the whole of No. 1, Albemarle Street to the first respondents, Volito Managements Ltd., for a term expiring on December 25, 1970. The premises leased to the applicants did not contain showrooms or anything of that sort; they were used solely as the head office, and in fact the applicants had been in occupation of the premises since the time of their incorporation in 1912.

The respondents did not challenge the right of the applicants to a new tenancy under the terms of the Landlord and Tenant Act, 1954, but there was a dispute as to what the terms of the new tenancy should be. There were four matters in dispute: first, duration of the new lease; secondly, the proper rent to

[1] Landlord and Tenant Act, 1954, s. 35: "The terms of a tenancy "granted by order of the court . . . "(other than terms as to the duration "thereof and as to the rent payable "thereunder) . . . in default of . . . "agreement, may be determined by "the court; and in determining those "terms the court shall have regard to "the terms of the current tenancy "and to all relevant circumstances."

be paid under the new lease; thirdly, a question as to the rights of access to the demised premises; and, fourthly, whether the applicants should be entitled to exhibit certain signs outside the building advertising "Triplex Safety Glass" as a term of the new lease. Under the terms of the existing lease the applicants were entitled to exhibit on the premises certain signs advertising "Triplex Safety Glass," and clause 7 provided: "The lessors hereby authorize and permit the lessees "to maintain during the continuance of this lease the adver-"tising signs or such other signs as shall be approved by the "lessors' surveyors in their present position facing Piccadilly "and Albemarle Street outside the building of which the "demised premises form part subject to the provisions as "follows. . . ." There were four signs in all.

There were three signs on the outside of the building between the ground and first floors; one in Albemarle St. saying: "Triplex Safety Glass"; a second on the corner of the building saying: "Fit Triplex and Be Safe"; and a third sign facing Piccadilly saying: "Triplex Safety Glass." The fourth sign was between the fourth and fifth floors and said: "Safety Triplex "Glass." The second and fourth signs were illuminated.

The respondents objected to the continued exhibition of the signs on the grounds that there was no jurisdiction to include a clause such as clause 7 in a lease ordered to be granted under section 29 of the Act; alternatively, that if there were jurisdiction so to include it, it should not be exercised.

Sir Lionel Heald Q.C. and *J. T. Plume* for the applicants.
R. E. Megarry Q.C. and *R. W. Vick* for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Henry Ltd.* v. *M'Glade* [2]; *Stumbles* v. *Whitley* [3]; *Engvall* v. *Ideal Flats Ltd.* [4]

UPJOHN J. stated the facts, and having held that fourteen years was a reasonable term for the new lease, that the rent should be fixed at £5,500 per annum, and that the hours of access to the demised premises should be the same as under the existing lease, continued: Now I come to the most important matter, the question of signs. The terms in the lease dealing with the exhibition of signs are to be found in clause 7. It has been rightly pointed out that that clause comes after the ordinary clauses that one expects to find in a lease, and after the proviso for re-entry. It comes directly after a clause entitling the lessees to break, and is in these terms: "The lessors hereby authorize "and permit the lessees to maintain during the continuance of "this lease the advertising signs or such other signs as shall be

[2] [1926] N.I. 144.
[3] [1930] 1 K.B. 393; 46 T.L.R. 37, 555.
[4] [1945] K.B. 205; [1945] 1 All E.R. 230.

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"approved by the lessors' surveyors in their present position "facing Piccadilly and Albemarle Street outside the building of "which the demised premises form part subject to the provisions "as follows"; then there are certain provisions which I do not think are material. It is plain that these signs had been there before this lease came into being, but no one can remember for how long they had been there. There is one other clause in connexion with this matter which I must read, and that is clause 2, sub-clause (10), a covenant by the lessees "not to affix "upon the external walls or otherwise on the outside or staircase "or corridors of the demised premises any name sign or placard "except of such dimensions and in such manner and place or "places (if any) as the lessors shall in writing sanction." Whence it follows that without the lessors' sanction the lessees are not entitled to exhibit any signs upon or outside the premises demised to them on the second floor. It is perhaps worthy of note that the lessors are defined as including their successors and assigns where the context so admits, and the expression "the lessees" includes their successors and permitted assigns where the context so admits. I have one further general observation. It seems to me that these signs are purely advertising signs and do not in any way indicate that the applicants in fact have a head office within No. 1, Albemarle Street.

Objection to the continued exhibition of these signs is taken by the respondents on two grounds: first, that there is no jurisdiction to include a clause such as clause 7 in a lease ordered under section 29 of the Landlord and Tenant Act, 1954; secondly, they submit that if there is such a jurisdiction, then it ought not to be exercised in this case. This question of jurisdiction raises an interesting and difficult point, and some reference to the sections of the Act now becomes necessary. The first one I need refer to is section 23 (1), which provides: "Subject to the "provisions of this Act, this Part of this Act applies to any "tenancy where the property comprised in the tenancy is or "includes premises which are occupied by the tenant and are so "occupied for the purposes of a business carried on by him or for "those and other purposes. (3) In the following provisions "of this Part of this Act the expression 'the holding,' in relation "to a tenancy to which this Part of this Act applies, means the "property comprised in the tenancy, there being excluded any "part thereof which is occupied neither by the tenant nor by a "person employed by the tenant and so employed for the "purposes of a business by reason of which the tenancy is one "to which this Part of this Act applies."

Section 24 provides for the continuation of tenancies on their termination by the landlord or at the request of the tenant for a new tenancy. Section 29 (1) is in these terms: "Subject to "the provisions of this Act, on an application under subsection "(1) of section twenty-four of this Act for a new tenancy the "court shall make an order for the grant of a tenancy comprising

"such property, at such rent and on such other terms, as are "hereinafter provided."

Section 32 contains one important and relevant provision. Subsection (1) provides: "Subject to the next following sub-"section, an order under section twenty-nine of this Act for the "grant of a new tenancy shall be an order for the grant of a new "tenancy of the holding; and in the absence of agreement "between the landlord and the tenant as to the property which "constitutes the holding the court shall in the order designate "that property by reference to the circumstances existing at the "date of the order." By subsection (3): "Where the current "tenancy includes rights enjoyed by the tenant in connection "with the holding, those rights shall be included in a tenancy "ordered to be granted under section twenty-nine of this Act." The applicants, of course, rely upon that subsection. [His Lordship read section 33 [1] and continued:] Section 35, which is the other section upon which the applicants rely provides: "The "terms of a tenancy granted by order of the court under this "Part of this Act (other than terms as to the duration thereof "and as to the rent payable thereunder) shall be such as may "be agreed between the landlord and the tenant or as, in default "of such agreement, may be determined by the court; and in "determining those terms the court shall have regard to the "terms of the current tenancy and to all relevant circumstances."

In section 69 (1) "Tenancy" is defined in this way: "'tenancy' means a tenancy created either immediately or "derivatively out of the freehold, whether by a lease or under-"lease, by an agreement for a lease or underlease or by a tenancy "agreement or in pursuance of any enactment (including this "Act), but does not include a mortgage term or any interest "arising in favour of a mortgagor by his attorning tenant to his "mortgagee, and references to the granting of a tenancy and to "demised property shall be construed accordingly." Then the section provides that "'terms,' in relation to a tenancy, includes "conditions."

Dealing first with section 35, Sir Lionel Heald, for the applicants, invites me to give the widest possible meaning to the word "terms," wherever it is found in that section, and to the phrase "terms of the current tenancy." He referred me to authorities on the earlier Landlord and Tenant Act, 1927, and on the Rent Restriction Acts. I do not, however, refer to them in detail, for it is, after all, a question of construction of the Act in each case. Certainly it is true to say that those

[1] Landlord and Tenant Act, 1954, s. 33: "Where on an application "under this Part of this Act the "court makes an order for the "grant of a new tenancy, the new "tenancy shall be such tenancy as "may be agreed between the land-"lord and the tenant, or, in default "of such an agreement, shall be such "a tenancy as may be determined by "the court to be reasonable in all the "circumstances, being, if it is a "tenancy for a term of years certain, "a tenancy for a term not exceeding "fourteen years . . ."

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authorities do favour a wide construction. Mr. Megarry, on the other hand, invites me to take a narrower view of these words and phrases. One thing must be clear in the circumstances of this case. Clause 7 of the original lease creates a licence to exhibit these signs and no more. It cannot possibly be said that this right to exhibit signs can be described as part of the demised premises or as part of the holding, for these signs are not part of the holding; they are not contiguous to the holding or anything of that sort. Mr. Megarry submits that in construing section 35 I ought to have regard only to the terms of the tenancy. He points out that in contrast, indeed, to the Rent Restriction Acts, the reference is to the tenancy and not to all the terms contained in the tenancy agreement. He, therefore, says that under section 35 the only terms to which the court ought to have regard are those terms which are properly described as the terms of a tenancy by demise, and ought not to include any terms which cannot properly be described as relating to the demised property. He suggests two tests by way of analogy; first, that the terms might be taken to be analogous to the easements and quasi-easements which are to be found set out in section 62 of the Law of Property Act, 1925; secondly, he suggests, as another test to discover what terms are relevant, that one should have regard only to the terms which can properly be described as touching or concerning the land demised, and which, therefore, would run with an assignment of the lease, or with an assignment of the reversion, upon any assignment. He refers me to two cases: *Thomas* v. *Hayward*[2] and *Dewar* v. *Goodman*,[3] approved in the House of Lords.[4] He submits, and I accept his submission that, judged by the tests laid down in those cases, the rights contained in clause 7 would not pass on an assignment of the lease. It is possible they might pass by express assignment, but that, of course, would require the consent of the landlords. But he submits, and I agree with him, that the rights set out in clause 7 are not terms which touch or concern the land demised. It is a pure licence to exhibit certain signs on property which has no relevant connexion with the actual property demised.

However, it is, as I have said, a question of construction of the Act, and first, I want to say a few words about section 32 (3). It is clear there that the rights enjoyed by the tenant in connexion with the holding must be included in any tenancy granted under section 29. Section 32, unlike section 35, gives the court no discretion in the matter. In my judgment, although it is not necessary to come to a final conclusion on the matter, it seems to me that section 32 is dealing with terms connected with the holding. Whether it be right to confine those terms to terms which touch and concern the land demised or not I need not say,

[2] (1869) L.R. 4 Ex. 311.
[3] [1908] 1 K.B. 94.
[4] [1909] A.C. 72.

but that is the type of right which is being dealt with in section 32. When one comes to section 35, which deals, as the side-note says, with other terms of the tenancy, it is a question of judicial discretion. That section goes much further than section 32. I do not believe that when section 35 was framed, Parliament was contemplating that there should be an elaborate dissection of the terms contained in the tenancy as between those which touch and concern the demised premises and those which do not. I think that Parliament intended to give a very wide discretion to the court, and that the court is entitled to look to all the terms contained in the current tenancy agreement. Further than that, the great width of section 35 is shown by the fact that the court is entitled, and, indeed, must have regard, not only to the terms of the current tenancy but to all relevant circumstances. It seems to me, therefore, that Parliament intended to confer upon the court the widest possible discretion.

I have come to the conclusion, as I have said, that I have the widest possible discretion in looking at all the terms of the current tenancy agreement and in considering all relevant circumstances, and it seems to me therefore, that I have jurisdiction to make an order for a new lease which contains some clause on the lines of clause 7. But the question is whether I should in fact exercise that discretion. We start with this, that this is in fact a clause which has no real connexion with the demised property; it is purely personal and it is merely a licence. Nevertheless, the applicants have had it and have exercised that right for at least 21 years, and it may be much longer. They do, in fact, attach a very great importance to it, and that, I think, is perfectly natural. It may be that if they do not get that right, they will not accept the new tenancy. That, of course, is a matter for them. Objection on the merits, however, is taken by the respondents. Their manager, in his affidavit, stated that it was desirable to preserve and maintain the prestige value and high quality nature of the building. He went on: "It is within my personal "knowledge that it is the policy of the lessors not to permit "the affixing and maintenance on the outside of the buildings of "which the demised premises form a part of signs of the nature "of the sign exhibited by the lessees, which is a lighted advertise-"ment sign [that is not accurate]. In the opinion of the lessor "and myself this or any advertising sign is out of keeping with "the use of the said building for the purposes mentioned in "paragraph 7 hereof and detrimental to the structure and "appearance of the said building."

At that stage, I pointed out that I travelled along Piccadilly most mornings from the vantage point of the upper deck of a No. 9 omnibus, and I asked whether the parties desired me to close my eyes to that fact, or whether I might take into account my own knowledge of the locus in quo, and I was in fact invited by both parties to take that into account. During the course of the hearing I made a careful inspection from Hamilton Place to

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Piccadilly Circus, and the idea that these signs are out of keeping seems to me, with all respect to the deponent, complete nonsense. There are signs almost by the hundred of that sort, and no detriment is suffered in that part of London if a building has a sign upon it. For many years, as we see from the Triplex Report for 1957, this building had yet another sign on it, "Car and General "Insurance," and when they left, that sign left with them. Mr. Megarry did not press this point. However, when the respondents' manager went into the witness-box, he was asked certain questions in chief and he put it in quite a different way. He said that in his experience of lettings to other tenants, they objected to paying the same rent as the one tenant who was entitled to have this big sign, although he was only occupying one-fifth of the premises, that they were trying to get tenants only of the highest standing, and that the presence of the signs had an effect on the tenants of the highest class who disliked signs of any type. Curiously enough, that general statement was not supported by a single example of any kind. The witness has had a good deal of experience of letting No. 1, Albemarle Street, but he never told me of a single case where an intending tenant objected to paying a very high rent on the ground that there was a sign advertising Triplex glass outside. I shall not mention names because matters are still in negotiation, but it appears that negotiations are now going on, and a friendly foreign power is endeavouring to acquire the ground floor, and indeed the first floor, and appears, if the respondents' manager's method of working it out is correct, to be prepared to pay a very high sum for the first floor. But there is no suggestion that they are the less willing because between the first and ground floor there is a large sign advertising Triplex Safety Glass. Further, a curious feature of the case is that none of the applicants' witnesses were cross-examined upon this matter at all, and the witness Rose, although called for the respondents as their expert, never dealt with it in his report or in his affidavit. He was asked some questions about it in chief, and he gallantly did his best to support the idea, but he did so obviously without conviction. There is one further circumstance, and that is that in 1956 the respondents' manager had a conversation with the estate agent then acting for the applicants. I have no doubt that the manager said that they did not want to continue the lease with regard to the signs, that they did not in fact want to have any more signs. I accept that. But he suggested that they might say £7,200 per year for 19 years, and £2,500 a year for the signs. He said he suggested that figure as a joke, merely to choke them off, but be that as it may, that offer was made and apparently accepted seriously by the agent, who communicated it to his principals.

Taking all these matters into consideration, I am quite satisfied on the evidence that the continued existence of these signs on this building, where they have been for 21 years at least, has

no adverse effect on the letting of the property. I do not for one moment accept that intending tenants are prepared only to pay lower rents; indeed an exhibit before me shows that they are, and have been, most willing to pay extremely high rents. I do not accept that, by reason of these advertisements, the highest class of tenant is turned away from trying to obtain a tenancy in this desirable building. The evidence is all the other way. Therefore, notwithstanding that this is a purely personal right, it does not seem to me that its continued existence does the slightest possible harm to the respondents, and I propose to exercise my jurisdiction to grant that right during the currency of the lease which I shall order. That being so, there is no real dispute before me as to the proper rent for that right. I have had evidence from two experts, one on each side, and they substantially agree. I shall assess the rent for this right at £300 per annum.

In those circumstances it is unnecessary for me to consider whether the applicants would have established a case under section 32 (3); I have already said enough to indicate that, in my judgment, that is a very different section from section 35.

Therefore the order that I propose to make is this: with regard to the main lease it will be for a period of 14 years with no option to break, at a rent of £5,500. The lease will be on the same terms as at present with the change in rent and the change in the term, that is to say, it will not vary the present terms as to access, and it will contain clause 7.

Order accordingly.

Solicitors: *Bird & Bird; Stuart Hunt & Co.*

P. P.

[QUEEN'S BENCH DIVISION.]

TSAKIROGLOU & CO. LTD. *v.* NOBLEE THORL G.m.b.H.

1958
Dec. 8, 9.
Diplock J.

Sale of Goods—C.i.f.—Route—Customary route blocked—Whether term implied into contract, for performance by customary route only.
Contract—Frustration—C.i.f. contract—Usual and customary route via Suez blocked—Finding that shipment round the Cape not commercially or fundamentally different.
Contract — Performance — Customary manner — Time when manner customary.
"Shipment."
Contract—Frustration—Fact or law—Finding by jury or arbitrator regarding commercial or fundamental difference.
Fact or Law.
Arbitration—Special case—Findings of fact—Primary facts—Jurisdiction of court to find secondary fact—Contract—Frustration.

By a written contract dated October 4, 1956, sellers agreed to sell to buyers Sudanese groundnuts for shipment c.i.f. Hamburg

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during November/December, 1956. On October 7 the sellers booked space in one of four vessels scheduled to call at Port Sudan in November and December, 1956. On November 2, the Suez Canal was closed to navigation, but the goods could have been shipped round the Cape of Good Hope. The sellers failed to ship the goods, and in arbitration proceedings, the umpire held that the sellers were in default and the appeal board in upholding the umpire's award found the following primary facts which were common to this case and *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.* (infra), in which McNair J. held that a similar contract was not frustrated:

(1) At the time of the contract buyers and sellers would assume that the goods would be shipped via Suez. (2) The voyage round the Cape was about two-and-a-half times the length of the voyage via Suez, which would take, in the case of a 10– to 11–knot steamer nearly seven weeks, instead of somewhat under three weeks, or correspondingly shorter periods in the case of faster vessels. It would involve two crossings of the Equator and a passage through the Southern Hemisphere in summer; the freight rate, about one-sixth of the c.i.f. price, would have been 25 per cent. higher from November 10, and 100 per cent. higher from December 13.

The appeal board in the present case further found: "The "performance of the contract by shipping the goods on a vessel "routed via the Cape of Good Hope was not commercially or funda-"mentally different from its being performed by shipping the goods "on a vessel routed via the Suez Canal." On appeal:—

Held, (1) that there was no implied term that shipment should be via a route which was, at the date of the sale contract, the usual and customary route.

Dictum of McNair J. in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.* [1958] 3 W.L.R. 390, 396, 397; [1958] 3 All E.R. 115 followed.

(2) That, on the primary facts, a jury could properly come to the conclusion that such contract was frustrated, but that they should not be directed as a matter of law to find frustration; the further question of fact to be drawn from those facts should be left to them whether an end was put in a commercial sense to the commercial speculation entered into by the parties.

Jackson v. *Union Marine Insurance Co.* (1873) L.R. 8 C.P. 572; L.R. 10 P.C. 125 applied.

Dicta of Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.* [1919] A.C. 435, 460; 35 T.L.R. 50 and Denning L.J. in *British Launderers' Research Association* v. *Hendon Borough Rating Authority* [1949] 1 K.B. 462, 471; 65 T.L.R. 103; [1949] 1 All E.R. 21 considered.

(3) That, similarly, the further finding of the appeal board in the present case was a legitimate inference of fact which was unassailable, since it consisted of persons with personal knowledge of the trade, unless they misdirected themselves, which they had not; it followed, as a matter of law, that this contract was not frustrated.

Per curiam. It was open to McNair J. to draw from the primary facts found by the appeal board in *Green's* case the conclusion of fact that performance by shipping via the Cape was commercially and fundamentally different from performance by shipping via Suez.

(4) That "shipment" in clause 6 of the contract, which provided for an extension of time in case of hostilities "preventing ship-"ment within the time fixed," meant the placing of goods on board, and thus any shipment which satisfied the terms of the contract was within the clause including, after the Canal was blocked, shipment via the Cape; and consequently clause 6 did not entitle the sellers to an extension of time for shipment.

In re Comptoir Commercial Anversois and Power, Son & Co. [1920] 1 K.B. 868 applied.

Special case stated by the Board of Appeal of the Incorporated Oil Seed Association.

By a contract in writing dated Hamburg, October 4, 1956, between the appellants, Tsakiroglou & Co. Ltd. of Khartoum as sellers, and the respondents, Noblee Thorl G.m.b.H. of Hamburg/Harburg as buyers, through agents, the sellers agreed to sell and the buyers to buy about 300 tons of Sudanese groundnuts in the shell basis 3 per cent. admixture new crop 1956/57 at £50 per 1,000 kilos including bags c.i.f. Hamburg. Shipment November/December 1956 with payment cash against documents on first presentation for 95 per cent. of the amount of provisional invoice balance to be paid after the analysis on final invoice. The contract form was to be the Incorporated Oil Seed Association Contract No. 38 with arbitration in London, and that contract was signed by the Hamburg agents. On October 7, the Red Sea Shipping Co. (Sudan) in Khartoum wrote to the sellers confirming that they had reserved space for the sellers for 300 tons groundnuts for shipment to Hamburg in one of four specified vessels due to call into their agency at Port Sudan for Hamburg during November/December, 1956. On October 25, 1956, the sellers made application for and were granted authority to export 315 tons (5 per cent. more or less included) groundnuts from Port Sudan c.i.f. Hamburg at £50 per 1,000 kilos. On November 1, 1956, a warehouse receipt was given to the sellers for 300 tons Sudanese groundnuts in shell to be held to the sellers' order in warehouse Port Sudan. On October 29, 1956, the Israelis invaded Egypt; on November 1, Britain and France commenced military operations and on November 2, the Suez Canal was blocked by block ships. On December 7, the sellers in a letter to the London agents requested them to advise the buyers that the Suez Canal was unlikely to be clear before the end of the shipment period and in that event they claimed an extension of time under clause 6 of the contract. On December 18, the buyers refused the extension. On January 7, 1957, the buyers claimed arbitration and on January 9, the buyers gave notice of intention to buy in against the sellers. Arbitrators appointed by both parties having failed to agree they appointed an umpire who, by an award dated February 20, 1957, awarded that the sellers were in default and should pay to the buyers as damages the sum of £5,625 together with £79 15s. cost of the award. The sellers being dissatisfied with the award gave notice of appeal and a Board of Appeal was appointed to hear the appeal on January 28, 1958. The Board of Appeal dismissed the appeal and upheld the umpire's award.

The relevant terms of the contract and findings of the Board of Appeal are fully set out in the judgment of Diplock J.

Eustace Roskill Q.C. and *R. A. MacCrindle* for the sellers.

J. Megaw Q.C. and *J. F. Donaldson* for the buyers.

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In addition to those cases referred to in the judgment, the following cases were cited in argument: *Universal Cargo Carriers Corporation* v. *Citati*[1]; *Davis Contractors Ltd.* v. *Fareham Urban District Council*[2]; *Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*[3]; *Fairclough, Dodd & Jones Ltd.* v. *J. H. Vantol Ltd.*[4]; *Krell* v. *Henry*[5]; *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[6]; *Port Line* v. *Ben Line Steamers Ltd.*[7]; *Mehmet Dogan Bey* v. *G. G. Abdeni & Co. Ltd.*[8]; *Postlethwaite* v. *Freeland.*[9]

DIPLOCK J. This is a case stated by the Board of Appeal of the Incorporated Oil Seed Association (which I shall call the I.O.S.A.); and it is yet another of the Suez cases. On October 4, 1956, the sellers, the appellants here, who are a company incorporated and resident in Khartoum, agreed to sell to the buyers, who are a company incorporated in Western Germany and resident in Hamburg, 300 tons of Sudanese groundnuts in the shell at £50 per 1,000 kilos c.i.f. Hamburg; shipment November/December, 1956, cash against documents modified in a respect material for the purposes of this case.

The contract terms were those of the I.O.S.A. Contract No. 38 which is headed: "Contract for West African Groundnuts in "the Shell." The printed terms relates to shipment from a West African port and a particular kind of charterparty. Clause 3 provides: ". . . Sellers shall insure goods against war risks on "usual Lloyds conditions but sellers' obligation in this respect "shall be limited to the terms and conditions in force and "generally obtainable in London at time of shipment. . . ." Clause 5, of which I need only read part: "Name of steamer "(or steamers) to be declared not later than date of sailing, but "not sooner than 15 days prior to the first day of the stipulated "period of shipment and if the steamer named, before loading, "is lost or suffers damage causing the cancelment of the charter-"party the seller shall have an extension of two months from the "official advice of the loss or cancelment to carry out the con-"tract by another vessel. . . ." Clause 6, on which the sellers specifically rely: "In case of prohibition of import or export, "blockade or war, epidemic or strike, and in all cases of force "majeure preventing the shipment within the time fixed, or the "delivery, the period allowed for shipment or delivery shall be "extended by not exceeding two months. After that, if the

[1] [1957] 2 Q.B. 401; [1957] 2 All E.R. 70; [1958] 2 Q.B. 254; [1958] 2 All E.R. 563.

[2] [1956] A.C. 696; [1956] 2 All E.R. 145.

[3] [1916] 1 K.B. 495; 32 T.L.R. 186.

[4] [1957] 1 W.L.R. 136.

[5] [1903] 2 K.B. 740; 18 T.L.R. 823.

[6] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[7] [1958] 2 Q.B. 146; [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.

[8] [1951] 2 K.B. 405; [1951] 2 T.L.R. 30; [1951] 2 All E.R. 162.

[9] (1880) 5 App.Cas. 599.

"case of force majeure be still operating, the contract shall be "cancelled."

Finally, a portion of clause 10, the default clause: "In default "of fulfilment of contract by either party the other party at his "discretion shall, after giving notice in writing, have the right "to sell or purchase, as the case may be, against the defaulter "who shall make good the loss, if any, on such sale or purchase "on demand. . . ."

That contract being entered into on October 4, 1956, on October 7 the sellers booked space for 300 tons of groundnuts to be shipped to Hamburg in one of four vessels scheduled to call at Port Sudan in November and December, 1956. On October 25, 1956, the sellers got an export permit for the necessary quantity of groundnuts and on November 1, 1956, 300 tons of groundnuts in warehouse at Port Sudan were held to their order. The Suez Canal was nationalised on July 26, 1956, long before this contract was entered into. The Israeli forces began military operations against Egypt on October 29, 1956. The British and French forces began military operations against Egypt on November 1, 1956. Port Said was captured on November 5, 1956, and there was a cease fire on November 6, 1956. The Suez Canal was blocked on November 2, 1956, and, as a matter of history, remained closed to shipping until April 9, 1957.

On December 7, 1956, after the Canal was blocked, but before the shipping period had expired, the sellers claimed an extension under clause 6. On December 18 the buyers refused the extension. On January 7, 1957, the buyers claimed arbitration, and on January 9, 1957, the buyers gave notice of intention to buy in against the sellers under the default clause, that is to say, they elected to treat the contract as rescinded by the sellers' wrongful repudiation by breach of condition in not shipping within the contract period, November/December, 1956.

The Appeal Board of the I.O.S.A., upholding the umpire, who awarded the buyers £5,625 damages, held that the buyers were entitled to do so. There are a number of relevant findings of fact which I must read. "1. Sudanese groundnuts are "harvested at the end of October or beginning of November and "the customary port for shipment of such groundnuts is Port "Sudan. All groundnuts exported from Sudan to Europe are "shipped from Port Sudan which is the only suitable port." No port of shipment was mentioned in the contract, but it is conceded by both sides that by necessary implication on that finding of fact Port Sudan was the contemplated port and contractual port of shipment. Finding of fact No. 2 is: "At the "date when the contract was entered into the usual and normal "route for the shipment of Sudanese groundnuts from Port Sudan "to Hamburg was via the Suez Canal. It would be unusual "and rare for any substantial parcel of Sudanese groundnuts "from Port Sudan to Europe to be shipped via the Cape at all "times when the Suez Canal was open." Paragraph 6: "The

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"closure of the Suez Canal prevented transport of the contract "goods from Port Sudan to Hamburg via the Suez Canal and "the impossibility of transportation by that route continued until "April, 1957. The sellers could have transported the goods "from Port Sudan to Hamburg via the Cape during November "or December, 1956. 7. The distance from Port Sudan to "Hamburg via the Suez Canal is approximately 4,386 miles and "the distance from Port Sudan to Hamburg via the Cape of Good "Hope is approximately 11,137 miles. The distance from Port "Sudan to Suez is 694 miles. 8. The freight ruling at the time "of the contract for the shipment of groundnuts from Port Sudan "to Hamburg via the Suez Canal was about £7 10s. per ton. "After the closure of the Canal the Port Sudan-U.K. Conference "imposed the following surcharges for goods shipped on vessels "proceeding via the Cape of Good Hope, viz., as from November "10, 1956, 25 per cent., and as from December 13, 1956, 100 "per cent." Paragraph 10: "At the date when the contract "was made both parties contemplated that shipment would be "made via the Suez Canal."

In addition to these findings of fact there are mixed findings of law and fact, and those that I need read at the moment are in the following terms: "12. (iv) It was not an implied term of the "contract that shipment or transportation should be made via "the Suez Canal. (v) The contract was not frustrated by the "closure of the Suez Canal," and, finally, subparagraph (vi): "The performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commer-"cially or fundamentally different from its being performed by "shipping the goods on a vessel routed via the Suez Canal."

It is conceded that, although slightly different in wording, these findings of fact and of mixed law and fact are substantially the same as those that there were in the case stated, which was the subject of the decision in *Carapanayoti & Co. Ltd.* v. *E. T. Green Ltd.*[1] (which I shall hereafter call *Green's* case), and decided as recently as July 18, 1958. There is, however, one important difference; finding No. (vi) was not present in *Green's* case. In *Green's* case [1] McNair J. held that a contract not differing in any material respect from the present, except for the finding corresponding to subparagraph (vi), was frustrated by the blocking of the Suez Canal. The crucial question in this case, in my view (though there are others to deal with), is whether finding No. (vi) makes this case distinguishable from *Green's* case,[1] although, if it does not, the buyers invite me not to follow McNair J.'s decision.

One point, since it goes to the argument on frustration as well as to the argument on subparagraph (vi), I can deal with first and shortly. This is a contention of the sellers that in a c.i.f. contract it is an implied term that shipment shall be via a route which is

[1] [1958] 3 W.L.R. 390; [1958] 3 All E.R. 115.

at the date of the sale contract a usual and customary route, and, if there is at that date only one usual and customary route, by that route. Here there is a finding of fact that the usual and normal route was via Suez and that was the only usual and normal route. The contract, therefore, the sellers argue, must be read as if the words "via Suez" were inserted after the word "shipment" and before the words "November/December, 1956." There is no direct authority for this proposition. So far from its being a necessary implication, it seems to be one which any business man would reject. I am prepared to echo the following passages in McNair J.'s judgment in *Green's* case where he says [2]: "In principle, it seems to me that where a contract "expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried "out in a customary manner, the performance must be carried "out in a manner which is customary at the time when the "performance is called for. This is particularly so in the case of "forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in mind that in "mercantile matters custom and usage are subject to rapid "change: . . . For example, in times of strained international "relations the customary form of bills of lading may change by "the universal acceptance of a particular form of war-risk protection. Can it be said that the seller is bound to tender the form "of bill of lading which was customary at the date of the contract "when, by the time when performance has arrived, that form has "been supplanted by another customary form? I think not." Then he says, lower down [3]: "In my opinion, as a matter of "principle, the sellers' obligation under a contract such as this is "not confined to shipping by a route which was a usual and "customary route at the date of the sale contract, but is to ship "by a route usual and customary at the time of performance." In the following passage McNair J., who had not had the advantage of a closer examination into *Upjohn* v. *Hitchens* [4] which I have had, fortifies his opinion by the observations of Roche J. in *Upjohn* v. *Hitchens*.[5] I do not rely upon that as fortifying my conclusion. I am satisfied with the fortification that McNair J.'s view on this topic agrees with mine.

I now turn to frustration, remembering that frustration is not to be lightly held to have occurred as it puts an end to a contract independently of the volition of the parties at the time of the frustrating event, and it may be, without either party being conscious that what has happened has snapped their contractual bonds. The case books are full of reports of cases where lay arbitrators have found contracts to be frustrated and the court has held that they were wrong. Lawyers have ever been more prone than merchants to cling to the letter of the contract; see,

[2] [1958] 3 W.L.R. 390, 396.
[3] Ibid. 397.
[4] [1918] 1 K.B. 171; [1948] 2 K.B. 48 (C.A.); 34 T.L.R. 412.
[5] [1918] 1 K.B. 171, 179.

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for example, *Shylock* v. *Antonio*, a case which might have been decided on grounds of public policy but, in fact, turned on a pure question of construction. *Green's* case [6] is one of the very few cases, if it is not unique, where trade arbitrators have found a contract not to be frustrated and the court has found that it was. I should be very reluctant, particularly in the Commercial Court, to come to a different conclusion of law from that reached by McNair J. in the same court as recently as last July, if I thought that the facts with which I am confronted were indistinguishable from those with which he was confronted in *Green's* case.[6] The Appeal Board's finding in paragraph 12 (vi) seems to me to be a vital difference. That finding I repeat: "The performance of the "contract by shipping the goods on a vessel routed via the Cape "of Good Hope was not commercially or fundamentally different "from its being performed by shipping the goods on a vessel "routed via the Suez Canal." It makes a vital difference, of course, only if it is, or at any rate includes, a finding of fact and is not a mere finding of law.

This brings one really to the question: What are the respective provinces of the judge and the jury in a frustration case? In other words, how should this case be summed up to a jury? What is the question on which they should be invited to bring in a special verdict? There are certain findings of fact which are common to the present case and to *Green's* case,[7] and which are undisputedly pure questions of fact and which, in the illuminating analysis of Denning L.J. in *British Launderers' Research Association* v. *Hendon Borough Rating Authority*,[8] would be called "primary facts." The most important of them are: (1) At the time of the contract buyers and sellers would assume that the goods would be shipped via Suez. (2) The voyage round the Cape was about two and a half times the length of the voyage via Suez, which would, in a 10- to 11-knot steamer take nearly seven weeks, instead of somewhat under three weeks or correspondingly shorter periods in faster vessels. It would involve two crossings of the Equator and a passage through the Southern Hemisphere in summer; the freight rate in *Green's* case was £6 10s. out of the total c.i.f. price of £28 15s., and in the present case, £7 10s. out of the c.i.f. price of £50 would have been 25 per cent higher from November 10, and 100 per cent. higher from December 13. On those facts, undoubtedly, a jury could come to the conclusion, I think, as McNair J. did, that the contract was frustrated by the blocking of the Suez Canal.

What I have to decide is whether on those facts a jury should be directed as a matter of law to find frustration, or whether there is a further conclusion to be drawn from those facts which can as well be drawn by a layman properly instructed on the law as by a lawyer, and which is, therefore, a conclusion of fact for the

[6] [1958] 3 W.L.R. 390.
[7] Ibid.
[8] [1949] 1 K.B. 462, 471; 65 T.L.R. 103; [1949] 1 All E.R. 21.

tribunal of fact (see the *British Launderers'* case [9]). I think that clearly there was and that, despite all the water that has flowed under the bridge since *Jackson* v. *Union Marine Insurance Co.*[10] was decided, it can today be phrased as simply as the question that was left to the jury by Brett J.[11] in *Jackson's* case and approved in 1874 by the strong Court of Exchequer Chamber, most of whose members had long experience of the pre-Judicature Act procedure under which special verdicts were obtained from juries at nisi prius, and argument as to the consequences of such special verdicts was subsequently conducted before the common law court in banc. The question in that case was left to the jury in these terms: Whether the time necessary to get the ship off and repairing her, so as to be a cargo-carrying ship, was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and the charterers? With the greatest respect to everything that has been said since, including some criticism by Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.*,[12] I do not think that in a case of this kind that question or one analogous to it can be improved upon as a question to be put to the jury, and I would note in passing that Lord Sumner's criticism, to which I have referred, was that it made it too easy for a jury to find frustration, not too difficult. That question, I think, is a question of fact and, where it is answered, the answer is a conclusion of fact found by the jury. It is a finding of fact of the utmost relevance in answering the ultimate question of law: "Was the contract frustrated?" in whichever of the anthology of phrases you care to select as the best way of posing that ultimate question of law. As McNair J. said in *Green's* case [13]: "It is the function of the court to determine, as "a matter of law, whether frustration arises on the court's "appreciation of the facts found and of the legitimate inference "to be drawn from such facts." The legitimate inferences to be drawn from the facts found include any conclusions of fact and, in the absence of any finding by the arbitrators in *Green's* case, that "the performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commercially "or fundamentally different from its being performed by shipping "the goods on a vessel routed via the Suez Canal," it was a conclusion of fact which it was open to the judge to draw from the facts that were found in *Green's* case that performance by shipping via the Cape was commercially and fundamentally different from a performance by shipping via Suez. McNair J. did, I think, apply his mind to precisely that question of fact and drew the inference [14] that the circumstances of the longer and different route of transport would involve or might involve the

[9] [1949] 1 K.B. 462, 471.
[10] (1874) L.R. 10 C.P. 125.
[11] (1873) L.R. 8 C.P. 572.
[12] [1919] A.C. 435, 460; 35 T.L.R. 150.
[13] [1958] 3 W.L.R. 390, 399.
[14] Ibid. 400.

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seller in quite different obligations as to the condition of the goods on shipment from that involved in a shipment via the canal.

I do not think it is necessary for my purpose to express any view on the argument addressed to me by Mr. Megaw as to whether that was a conclusion of fact which could legitimately be drawn without some further findings of fact by the arbitrators as to the qualities and character of the goods and the effect of a longer shipment on them. But I am faced with quite a different problem from that with which McNair J. was faced. I have a finding of fact, or, to use the jury analogy, a special verdict, that "the performance of the contract by shipping the goods on a "vessel routed via the Cape of Good Hope was not commercially "or fundamentally different from its being performed by shipping "the goods on a vessel routed via the Suez Canal." If that finding were unassailable, then, in my view, it follows that the contract was not frustrated. To each of the three questions put in *Green's* case [15]: "(1) Must the parties have made their bargain "on the basis that, if the Canal was no longer available when "the sellers elected to perform, the contract would be off?"; or "(2) Was the closure of the Suez Canal a circumstance funda-"mental enough to transmute the sellers' obligation into an "obligation of a different kind, which the contract did not "contemplate, and to which it could apply?"; or "(3) Would "the answer to the 'officious bystander' have been: 'Of course, "'if the Canal is closed after November 2, the contract is "'off'?"; if that finding of fact is unassailable, the answer must be "No."

The question with which I am confronted is: Can that finding by the Appeal Board stand? In the case of a jury a special verdict of this kind could be assailed on two grounds. First, that there was no evidence that could reasonably support it, and secondly, that they had been misdirected as to the meaning of the question on which they had brought in a special verdict. In the case of a trade arbitration such as this where the Appeal Board consists of persons familiar with the trade, the first ground does not arise. The Appeal Board are entitled to use their personal knowledge or expertise in arriving at conclusions of fact. They are not limited to the evidence of witnesses called before them. As regards the second ground, in an arbitration this really amounts to showing that the Appeal Board have misdirected themselves as to the meaning of their finding. Their finding is expressed in very simple language which any judge might do well to emulate, and which he would have to do if we went back to juries in frustration cases. The only words as to the meaning of which the Appeal Board could possibly have directed themselves are those in the phrase "commercially or fundamentally different," and I should have thought that the adverb "commercially," at any rate, is

[15] [1958] 3 W.L.R. 390, 399.

one that commercial men like this Appeal Board could readily understand. They had directed their minds to the right contract, a contract for the sale of goods of which shipment and carriage from Port Sudan to Hamburg was but an incident, although no doubt an essential incident. And unless I am to assume that they have misunderstood the simple words "commercially or fundamentally different," they have found that in the particular trade—that is the trade in Sudanese groundnuts—the sellers' obligations as to the condition of the goods on shipment are not materially different if a shipment is via the Cape instead of via Suez, and that the delay in arrival in Hamburg involved in the longer shipping route, at any rate, under a contract which gives a two months' shipping period, does not make it a different kind of contract from that contemplated when it was entered into.

I see no ground on which I can set aside or ignore this finding, which I regard as a conclusion of fact. I think that its presence in the case stated constitutes a crucial difference between the facts of this case and those of *Green's* case. I therefore hold that the Appeal Board was right in law in deciding that the contract was not frustrated by the closing of the Suez Canal.

I can deal shortly with the remaining point in the case, which is: Did clause 6 of the contract entitle the sellers to an extension of time for shipment? The findings, whether they be of fact or law, which are relevant to this issue are findings subparagraphs (i), (ii) and (iii) of paragraph 12. They were as follows: "(i) There were hostilities but not war in Egypt at "the material time. (ii) Neither war nor force majeure pre-"vented shipment of the contract goods during the contract "period if the word 'shipment' means placing the goods on "board a vessel destined for the Port of Hamburg. (iii) If "the word 'shipment' includes not only the placing of the "contract goods on board a vessel but also their transportation "to the contract destination then shipment via the Suez Canal "was prevented during the contract period of shipment by "reason of force majeure but shipment via the Cape was not "so prevented." The only question of law is: Does "the "shipment" in clause 6 mean shipment via Suez, i.e., not merely placing the goods on board a vessel, but also carrying them by that route to the port of destination, or does it mean placing the goods on board a vessel destined for the Port of Hamburg by whatever route? I have already held that as a matter of construction the words "shipment via Suez" cannot be read into the contract. "Shipment" in clause 6 means any shipment which satisfies the terms of a contract and thus includes, after the blocking of the Suez Canal, shipment via the Cape. The word "shipment" I hold as a matter of construction means, and means only, placing the goods on board: see *In re Comptoir*

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Commercial Anversois and Power, Son & Co.,[16] where Bailhache J., in a passage which was approved, I think, by all the members of the Court of Appeal, said this: "Now, if I give to the "word 'shipment' the widest meaning of which it is capable, "it cannot mean more than bringing the goods to the shipping "port and then loading them on board a ship prepared to carry "them to their contractual destination."

Mr. Roskill has, however, one further string to his bow. He contends in the alternative that "the shipment" means "the "intended shipment," and there is a finding of fact that space had been reserved on vessels to sail in the contract period via Suez. The clause appears to me to be perfectly intelligible and perfectly sensible without reading into it a word that is not there, and I for one decline to do so.

The question put was: Whether on the true construction of the contract and the facts found the sellers were in default? To that question I answer "Yes," with the consequence that the appeal fails.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.; Bernard Samuel Berrick & Co.*

C. J. E.

[16] [1920] 1 K.B. 868, 878.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1959
Jan. 26.

Lord Parker C.J., Donovan and Ashworth JJ.

REGINA *v.* JONES.

Criminal Law—Homicide—Killing in course of other offence—Theft—"In course . . . of theft"—Money stolen from shop—Murder on premises to escape detection—Whether "in the course . . . of theft"—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 5 (1) (*a*).

The appellant broke into a store and took money from a safe upstairs. When he was about to go downstairs, the front door clicked, the downstairs light went on and the manager of the store came upstairs. When he was near the top of the stairs the appellant struck him a fatal blow. The appellant was convicted of capital murder under section 5 (1) (*a*) of the Homicide Act, 1957. He appealed, alleging that, as he had decided to leave the premises before he heard the front door open, the theft was complete and he was no longer acting "in the course . . . of theft" when he struck the manager, and, therefore, he could not be guilty of capital murder:—

Held, that where a man, having stolen money and while still at the scene of the theft, in order to escape detection, committed murder, that was murder "in the course . . . of theft" and was capital murder.

H.M. Advocate v. *Graham*, 1958 S.L.T. 167 followed.

APPEAL against conviction.

On September 30, 1958, at about 9 p.m., the appellant, Ernest Raymond Jones, broke into a co-operative society stores near Huddersfield. Downstairs, he collected some cigarettes which he put into a carton ready to take away from the premises. He then went upstairs, where, as the result of a previous successful burglary, he knew there was a safe. To his surprise he found the safe open, and took about £70 from the safe and put it into his pocket. He was about to go downstairs when he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour at the top of the stairs. The man who had just entered was the manager of the store; he came up the stairs in order to lock up and close the safe. When he was near the top of the stairs he received a blow from the appellant, as a result of which he died, and it was found that his skull was fractured in five places. The appellant was charged with capital murder.

At his trial the appellant's defence was that he had merely pushed the manager, who must have struck his head and fractured his skull in falling, and that he had no intention of doing grievous bodily harm to the manager and certainly no intention of murdering him, but if it were held that his acts constituted murder, nevertheless it was not murder done in the course or furtherance of theft so as to constitute capital murder within the meaning of section 5 (1) (*a*) of the Homicide Act, 1957.[1] The appellant was convicted of capital murder.

He appealed on the ground that his defence with regard to capital murder was not put to the jury. That defence was, that having found the safe door open, he thought that someone had been there before him and he took fright; he took what money he could lay his hands on and decided to leave at once, without even taking the cigarettes he had collected downstairs. At that moment his theft was complete, and he was no longer acting "in the course . . . of theft" when he struck the manager.

Bernard Gillis Q.C. and *Lionel H. Scott* for the appellant.
Geoffrey Veale Q.C. and *R. Withers Payne* for the Crown.

H.M. Advocate v. *Graham*[2] was cited in argument.

LORD PARKER C.J. The appellant was convicted at Leeds Assizes of capital murder and he now applies for leave to appeal against his conviction.

The facts are in a very short compass. On September 30, 1958, about 9 p.m., he broke into a co-operative society stores near Huddersfield. He collected downstairs some cigarettes which he put into a carton ready to take away from the premises.

[1] Homicide Act, 1957, s. 5 (1): "(*a*) any murder done in the course "... the following murders shall be "or furtherance of theft; ..." "capital murders, that is to say,—

[2] 1958 S.L.T. 167.

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He then went upstairs, where, as the result of a previous successful burglary, he knew there was a safe. To his surprise he found that the safe was open. He took silver and notes to the tune of about £70 out of the safe and put it all or most of it into his pocket, and he was about to descend the stairs when he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour. In fact the man who had come into the premises was the manager of the store, and he came up the stairs in order to shut up and to close the safe. When he was near the top of the stairs he received a blow from the appellant, as a result of which he died, and it was found that his skull was fractured in five places.

The appellant's first defence was based on an alibi, but that was not persisted in. At the trial his case was that he had merely pushed the manager who must have struck his head and fractured his skull in falling. At any rate, his case was that he had no intention of doing the manager grievous bodily harm let alone committing murder, and finally that, even if it were held that his acts constituted murder, yet it was not murder done in the course or furtherance of theft so as to constitute capital murder within the meaning of section 5 (1) (*a*) of the Homicide Act, 1957.

As regards the defence that he had no intention to inflict grievous bodily harm or murder, no complaint is made whatsoever of the very careful directions given by the judge both on the law and on the facts. It is sufficient to say that there was ample evidence on which the jury could come to the conclusion that this was murder and not manslaughter. The real point taken on this appeal concerns the question whether the murder was committed in the course or furtherance of theft so as to constitute capital murder. It is said that if the appellant were to be believed the theft was complete. His case was, that having found the safe open, he thought somebody had been there recently, that he took fright, that he took what money he could immediately lay his hands on and decided then and there to leave the premises without looking round for anything else to take, and without even collecting the cigarettes which he had put aside. In other words, his case was that he took fright and that, quite apart from the clicking of the front door, he had determined to go.

It is said that that defence was never adequately put to the jury. In the view of this court the defence was put, true not in very great detail, but it was adequately put. But the matter does not end there. Even if this were a case in which the defence had not been properly put, it does not seem to this court that the argument is sound that if a man may be charged with thieving the offence is complete for all purposes, so that if thereafter in an attempt to avoid detection he strikes somebody and commits murder that it is not capital murder. This was a case where the prisoner was caught red-handed at the scene of the theft, and in order to avoid detection he commits murder. It is

difficult to see why that should not be within the words "in the "course . . . of theft."

The court has been referred to the summing-up by Lord Sorn in *H.M. Advocate* v. *Graham*.[1] The facts do not matter but in the course of summing up Lord Sorn said this[2]: "Now you have just heard it suggested to me by "counsel for the defence that murder is only done in the course "of theft if the man did it in order to get on with the theft after "he had done the murder. I think that was the suggestion. I "have only got to tell you that I do not agree with that. It is a "question of what is meant by the course of a theft, and I think "that the course of a theft is begun when perpetration is begun; "that is to say, that it covers the period of attempt as well as "the period of completion; the attempt of the crime as well "as the crime; and I say that if a burglar is interrupted in that "course, the course of perpetration, and if he murders even in "order to get away, not with the idea of going on, but with the "idea of getting away, it still is murder done in course of theft. "It would be, I think, somewhat ridiculous to suppose that "Parliament has said: 'We will make it murder if the house-"'holder who wakes up and goes to interfere with a burglar and "'gets killed by a burglar who kills him in order to go on with "'his stealing, but we won't make it capital murder if the "'burglar murders him in order to run away.' I think it does "not matter what he was going to do afterwards; or what he did "afterwards; if he was in course of theft and he did the killing, "it is 'in course of' within the meaning of section 5 of the "Homicide Act; and I so direct you in law."

In the view of this court that summing-up of Lord Sorn was perfectly correct and the court agrees with what Lord Sorn there said. The court would only add that for the purposes of this case it has only been necessary to consider the words "in the course . . . "of theft," and not the further words "or furtherance of theft"; the consideration of the whole of those words together remains for another occasion. In these circumstances, the court is clearly of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *The Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

C. J. E.

[1] 1958 S.L.T. 167. [2] Ibid. 169.

[QUEEN'S BENCH DIVISION.]

1959
Jan. 19, 20.

Lord Parker C.J., Donovan and Ashworth JJ.

EALING CORPORATION *v.* JONES.

Town and Country Planning—Enforcement notice—Appeal—Notice quashed by court of summary jurisdiction—Whether local planning authority entitled to appeal to quarter sessions against decision—Whether "person aggrieved"—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23 (5).

A court of summary jurisdiction, on an appeal under section 23 (4) of the Town and Country Planning Act, 1947, quashed an enforcement notice served by the local planning authority, which required discontinuance of the use of a site for parking motor-vehicles, on the ground that that use by the appellant of the site was a use before the appointed day, and that no planning permission was required. The authority appealed to quarter sessions against the decision of the court of summary jurisdiction under section 23 (5) of the Act,[1] and the appeals committee, taking the view that the local planning authority was a "person aggrieved" within the meaning of section 23 (5), allowed the appeal:—

Held, that assuming that the words "any person" in section 23 (5) were capable of including a local planning authority, the authority in the present case was not a "person aggrieved" by the decision of the court of summary jurisdiction as no financial or legal burden had been placed upon it as a result of the decision; accordingly the authority had no right of appeal to quarter sessions under section 23 (5) and the appeal must be allowed.

Sevenoaks Urban District Council v. *Twynam* [1929] 2 K.B. 440; 45 T.L.R. 508, *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation* [1951] 2 K.B. 508; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032 and *Reg.* v. *Nottingham Quarter Sessions. Ex parte Harlow* [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78 applied.

Per curiam. If Parliament had intended the local planning authority to have a right of appeal from the decision of the court of summary jurisdiction under this section, it would have said so clearly and used words which placed the matter beyond all doubt and not the words "any person aggrieved," which the authorities showed was an ambiguous expression.

CASE STATED by the appeals committee of Middlesex Quarter Sessions.

By a notice of appeal given under section 23 (5) of the Town and Country Planning Act, 1947, the Ealing Corporation, the local planning authority, appealed against a decision of the justices for the petty sessional division of Brentford sitting at Ealing, quashing an enforcement notice served by the corporation on the appellant, John James Jones, on December 12, 1957, in so far as it related to the use of a site at 1388, Greenford Road, Ealing, for the parking of motor-vehicles. The following

[1] Town and Country Planning Act, 1947, s. 23: ". . . (5) Any person "aggrieved by a decision of a court "of summary jurisdiction under the "last foregoing subsection [subsec-"tion 4] may appeal against that "decision to a court of quarter "sessions."

additional facts, which were not included in the case stated but which counsel agreed should be before the court, are taken from the judgments. By the enforcement notice the local planning authority required the discontinuance of the use of the site for the parking of motor-vehicles, the allegation being that its use for that purpose was contrary to planning control, whereas the appellant maintained that the use for that purpose was a use before the appointed day and, accordingly, that no planning permission was required. On that issue the justices held that the use was not a new use but one which had existed before planning control. On March 19, 1958, the appeals committee heard the local planning authority's appeal against the justices' decision quashing the notice.

It was contended by the appellant (the respondent to that appeal) that the local planning authority was not a "person "aggrieved" within the provisions of section 23 (5) of the Act of 1947 and that, therefore, the committee had no jurisdiction to hear the appeal.

The local planning authority contended that it was a "person "aggrieved."

The appeals committee were of opinion in the light of the authorities cited that the local planning authority was a "person "aggrieved" within section 23 (5). They accordingly heard and allowed the appeal. The question stated for the opinion of the court was whether their decision that they had jurisdiction was correct in law.

Brendan Shaw for the appellant.
W. G. Wingate for the local planning authority.

In addition to the cases cited in the judgments, *Rex* v. *Surrey Quarter Sessions, Ex parte Lilley*[2] was cited in argument.

LORD PARKER C.J. This is an appeal by way of case stated by the appeals committee of Middlesex Sessions before whom Ealing Corporation, the local planning authority, appealed from a decision of the petty sessional division of Brentford, who had quashed an enforcement notice served by the corporation on one John James Jones. The point raised is the question which comes only too frequently before this court as to what is meant by the term a "person aggrieved" in a statute. [His Lordship stated the facts and continued:] Section 23 of the Town and Country Planning Act, 1947, provides for the serving of enforcement notices on the owner or occupier of land where the local planning authority consider that the user is in breach of planning control. Subsection (4) of that section provides: "If any person on whom "an enforcement notice is served under this section is aggrieved "by the notice, he may, at any time within the period mentioned

[2] [1951] 2 K.B. 749; [1951] 2 T.L.R. 546; [1951] 2 All E.R. 659.

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"in the last foregoing subsection, appeal against the notice to "a court of summary jurisdiction . . ." Pausing there, it will be seen that the powers of the court of summary jurisdiction are severely limited because the subsection goes on to provide: "and on any such appeal the court—(*a*) if satisfied that per-"mission was granted under this Part of this Act for the "development to which the notice relates, or that no such "permission was required in respect thereof, or, as the case "may be, that the conditions subject to which such permission "was granted have been complied with, shall quash the notice "to which the appeal relates; . . ." By subsection (5): "Any "person aggrieved by a decision of a court of summary juris-"diction under the last foregoing subsection may appeal against "that decision to a court of quarter sessions."

Accordingly, two points arise; first, whether the words "any "person" in subsection (5) are words which, in their context, cover the local planning authority; and, secondly, whether, assuming they are capable of including the local planning authority, it can be said that "any person aggrieved" covers the case of a local planning authority whose enforcement notice has been quashed on the ground that the alleged development was a development for which no permission was required.

As to the first, whether a local planning authority can come within the expression "any person" in this Act, we have been referred to a number of sections where it is true that a local planning authority is always specifically referred to in contrast to a person. On the other hand, it is to be observed that "any "person" appears in subsection (5) of section 23 as opposed to the words in subsection (4): "If any person on whom an enforce-"ment notice is served." It is also relevant to observe that the local planning authority under the statute may have to go to court and sue. An instance of that is section 24 itself, when one would expect if costs were given against it that it would be able to claim that it was an aggrieved person. I find it unnecessary, however, to come to a final conclusion on that point, and I will assume for the purposes of this appeal that the words "any person" are capable in the section of including a local planning authority.

Coming, therefore, to the second question, whether the local planning authority could be said to be aggrieved in the present case, I would like to make two general observations. First, I would like to voice a protest that Parliament continues to allow this expression to come into Act after Act of Parliament. As long ago as 1929, Lord Hewart C.J., in *Sevenoaks Urban District Council* v. *Twynam*,[1] referred to the fact that these words were so often used, and that if one looked at the cases, one would find some cases going one way and some the other. Notwithstanding that, the words continued to creep in after that date and continue

[1] [1929] 2 K.B. 440; 45 T.L.R. 508.

to do so today. This is another case where Parliament has failed to make clear what was really intended by those words.

The second general observation I would like to make is that so far as I know, and so far as counsel in the case know, this is the first case in which a local planning authority has claimed to have the right to appeal to quarter sessions under section 23. But that does not, of course, mean that it may not have the right.

As Lord Hewart C.J. pointed out in *Sevenoaks Urban District Council* v. *Twynam*[2]: "But as has been said again and again "there is often little utility in seeking to interpret particular "expressions in one statute by reference to decisions given upon "similar expressions in different statutes which have been "enacted alio intuitu. The problem with which we are concerned "is not, what is the meaning of the expression 'aggrieved' in "any one of a dozen other statutes, but what is its meaning in "this part of this statute?" Accordingly, I only look at the cases to which we have been referred to see if there are general principles which can be extracted which will guide the court in approaching the question as to what the words "person "aggrieved" mean in any particular statute.

It seems to me easier to say what will not constitute a person aggrieved than it is to say what "person aggrieved" includes. It is clear from the cases that a person aggrieved is not a person who is disappointed or annoyed at the decision. As was said by Lord Goddard C.J. in *Rex* v. *London Quarter Sessions, Ex parte Westminster Corporation*[3]: "Another case which has some, "though not very direct, bearing on the matter is *Reg.* v. *Keepers "of the Peace and Justices of the County of London*,[4] where "the question was raised whether the prosecutor in a quasi-"criminal case, a matter affecting a highway, was a person "aggrieved, and the court held that a prosecutor was never a per-"son aggrieved. It was put that he might be annoyed at finding "what he thought was a breach of the law was not a breach of the "law."

It is also clear that a person is not aggrieved when that person being a public body has been frustrated in the performance of one of its public duties. The argument was advanced in that same case, the *Westminster* case,[5] on behalf of the Westminster Corporation in these terms: "The corporation have a public "administrative duty to perform in the regulation of the streets; "and, having been interfered with in the execution of that duty "by the decision of the magistrate, they are persons aggrieved "by his order within the meaning of section 64 of the Act. It is "submitted that Parliament intended that the words 'persons "'aggrieved' in the section should be read in their widest sense, "and that they would clearly include persons who were frustrated

[2] [1929] 2 K.B. 440, 443.
[3] [1951] 2 K.B. 508, 511; [1951] 1 T.L.R. 932; [1951] 1 All E.R. 1032.
[4] (1890) 25 Q.B.D. 357.
[5] [1951] 2 K.B. 508, 509.

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"in the performance of a public duty." That argument was not acceded to in that case. Accordingly, I am satisfied that a mere annoyance that what was thought to be a breach of planning control turned out not to be a breach of planning control and, equally, the mere fact that this authority, charged with certain duties under the Act, has been frustrated in the performance of what it thought was its public duty, are not, of themselves considerations sufficient to make the local planning authority an aggrieved person. Approaching it from the other end, what is included in the words "person aggrieved"? If costs have been awarded in a case against a local authority, it is clear on the authorities that the local authority would be an aggrieved person. Equally, if the result of the decision has been to put some legal burden on the public body concerned, that has been held to make it a person aggrieved. In that connexion I would only mention *Reg.* v. *Nottingham Quarter Sessions, Ex parte Harlow*,[6] where this court held that the decision of the magistrates that the owner of premises was not obliged to provide a dustbin involved that "the council is left with a legal "burden which, if the order of the court of summary jurisdiction "had not been made, the council would have discharged"[7]; in other words, the burden would have fallen upon the council to provide a dustbin.

In the present case, in the first place, there has been no question of costs. In the second place, in my view, the effect of the decision has not been to put a burden in the sense of a financial burden on the local planning authority. It is true that the authority may be affected by the decision in some way in regard to rateable values, and it may be it will be affected if it choose hereafter to take steps under section 26, which would involve compensation, but in my view those contingencies are too remote to enable one to say within the principles laid down that the local planning authority is a "person aggrieved."

Finally, I confess that looking at the statute alone one cannot help feeling that if Parliament had intended the local planning authority to be able to appeal it would have said so clearly. As Ashworth J. pointed out in the course of the argument, by section 100 the Minister himself can, if he thinks it is expedient, serve an enforcement notice, "and any notice so served by the "Minister shall have the like effect as a notice served by the "local planning authority." Accordingly, if the argument for the local planning authority is correct it would have the surprising result that the Minister himself could be said to be a person aggrieved by the decision of the court of summary jurisdiction. In my judgment, the appeals committee of Middlesex Sessions was wrong in law and this appeal should be allowed.

[6] [1952] 2 Q.B. 601; [1952] 1 T.L.R. 1546; [1952] 2 All E.R. 78.

[7] [1952] 2 Q.B. 601, 605.

DONOVAN J. I agree. I think it is true that if one came to the expression without reference to judicial decision, one would say that the words "person aggrieved by a decision" mean no more than a person who had had the decision given against him; but the courts have decided that the words mean more than that, and have held that the word "aggrieved" is not synonymous in this context with the word "dissatisfied." The word "aggrieved" connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something, and so on, and I cannot see that that is so here. The local planning authority has simply been told that it cannot enforce the discontinuance of the present use of this land by the appellant by means of an enforcement notice under section 23. It has been told, in other words, that the appellant here has and always has had the right to go on using the land in the way in which he at present uses it, and so for the present the development plan must be modified. I say "at present" because there are provisions under sections 26 and 27 of the Act whereby the planning authority can, in effect, overcome the magistrates' decision. It is not necessarily, therefore, even frustrated, and I think the existence of this alternative power of control tends to support the view that Parliament did not think it necessary to confer on planning authorities a right of appeal from the magistrates' decision. It is quite true that compensation may have to be paid if the planning authority does exercise its powers under section 26 but that burden would not flow—immediately at any rate—from the magistrates' decision but from a subsequent administrative decision of the planning authority.

It is said by Mr. Wingate that this is a very important matter. Planning authorities have important public duties cast upon them and he argues that that, in itself, tends to support the view that they have a right of appeal from the magistrates' decision. I agree that the matter is important, but when this Act was passed in 1947 there were numerous decisions of the court available which show that the expression "person aggrieved" is ambiguous. It has caused a great deal of trouble and there are decisions on it both ways. In those circumstances, one might reasonably think that if Parliament wanted to confer a right of appeal on the local planning authority because this matter is so important, it would have used words which placed the matter beyond all doubt as it has done, for example, if I may be forgiven the reference, in sections 61 and 64 of the Income Tax Act, 1952, where the position of the subject and the public authority in relation to an appeal from an inferior tribunal is made perfectly clear. I also think that there is force in the argument that almost invariably in this Act the local planning authority is called by that name, and I think a better view to take is that Parliament would have done so in section 23 (5) if it had intended the local planning authority to have a right of appeal from the magistrates. Like

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the Lord Chief Justice, I am also impressed by the point made during the argument on section 100 by Ashworth J.

Ashworth J. Although I confess that this case has caused me more doubt than appears to have affected my brethren, I have arrived at the same conclusion and I have nothing I can usefully add.

Appeal allowed.

Solicitors: *A. V. Hawkins & Co., Harrow; E. J. Cope-Brown, Town Clerk, Ealing Borough Council.*

E. M. W.

[CHANCERY DIVISION.]

1958
Dec. 1, 2, 3, 4, 5, 16.

Harman J.

In re EICHHOLZ, decd.
EICHHOLZ'S TRUSTEE *v.* EICHHOLZ.

Gift—Intent to defraud creditors—Proof—Gift by insolvent donor—No proof of fraudulent intent—Whether voidable—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 172.

Bankruptcy—Executor—Insolvent estate—Administration in bankruptcy—Gifts made by deceased prior to death—Effect of Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 42, *on Law of Property Act,* 1925, *s.* 172.

The deceased married the defendant, his second wife, on January 18, 1955. By a contract dated February 14, 1955, he agreed to buy a freehold dwelling-house for £15,000, and paid a deposit of £1,550. By letter dated February 14, 1955, the deceased wrote to his bank "Under a contract of marriage . . . I am providing a house for her [the defendant] . . ." and having named the house and the vendor, requested the bank to loan him the purchase-money, and made suggestions for the repayment of the loan. Completion took place on March 15, 1955, by a conveyance by which, after reciting, wrongly, that there had been an agreement with the defendant for the purchase, the property was conveyed to her in fee simple. The deceased was not a party to the conveyance.

The deceased died on November 17, 1957. His estate was hopelessly insolvent and it was discovered that he had been insolvent at the date of the purchase of the house. By his will he appointed the defendant and his brother executors, and they swore an Inland Revenue affidavit in January, 1958, in which the defendant claimed the dwelling-house as her property.

As a result of many further claims made by creditors against the estate, the executors applied to have the estate administered in bankruptcy in April, 1958.

The trustee, whose claim for the return of the property was refused by the defendant, issued a writ claiming a declaration that there had been no gift of the property to the defendant which, therefore, she held as trustee and not beneficially; alternatively, that under section 172 of the Law of Property Act, 1925, the conveyance was voidable:—

Held, (1) that there was a gift of the house by the deceased to the defendant, but that the gift was not made for good consideration, the letter of February 14, 1955, being too ambiguous to support a contract made in consideration of marriage.

(2) That section 42 of the Bankruptcy Act, 1914, though applying to the administration of a deceased's property by the Court of Bankruptcy under section 130, did not affect the operation of section 172 of the Law of Property Act, 1925.

In re Gould (1887) 19 Q.B.D. 92 distinguished.

(3) That the trustee could set aside the gift of the house to the defendant under section 172 of the Law of Property Act, 1925, it being unnecessary to prove a fraudulent intent and sufficient merely to show that the circumstances were such that the gift would have the effect of defeating creditors.

Dictum of Lord Hatherley L.C. in *Freeman* v. *Pope* (1870) 5 Ch.App. 538, 540, applied.

ACTION.

The trustee of the property of Robert Nathaniel Eichholz, deceased, whose assets were being administered in bankruptcy, claimed a declaration as against the defendant, the widow of the deceased, that the freehold property known as "Peppermills" was held by her as trustee for the estate of her deceased husband and not beneficially.

MOTION.

The trustee in bankruptcy of Robert Nathaniel Eichholz, deceased, by a motion in bankruptcy, claimed a declaration as against the respondent, the widow of the deceased, that certain chattels were held by her as trustee for the estate of her deceased husband and not beneficially.

The following statement of facts, relevant to both action and motion, is taken from the judgment of Harman J.: The defendant in the action and the respondent to the motion was the widow of Robert Nathaniel Eichholz, he having married her on January 18, 1955. She was his second wife. When he died on November 17, 1957, the deceased was to all appearances a substantial man. He was a partner in an old-established firm of solicitors. He left a will under which his widow and his brother were appointed executors and they proved it on April 28, 1958. It was, however, by that time apparent that he was hopelessly insolvent. When the executors swore the Inland Revenue affidavit in January, 1958, this was already well known to them, for they swore his assets at some £45,000 and his estimated liabilities at £74,500. The affidavit showed that the deceased had a lease of a flat, 47, Lowndes Square, London, and owned its contents valued by the executors at £2,000. It also showed that since his marriage to his widow the deceased had made gifts to her valued at £44,000, and stated as follows: "On March 15, 1955, the deceased "provided the purchase money for the property known as "Peppermills, Lamberhurst, Kent, which was conveyed to his "wife. Price—£15,000. During the period March 15, 1955,

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Eichholz, decd., *In re.*

"to the date of death the deceased purchased for his wife various "fixtures, fittings, furnishings and pictures for use in the above "property. Value estimated at £24,000. Since January, 1955, "the date of the deceased's second marriage, he purchased various "personal chattels for his wife as presents. Value estimated at "£5,000." It was said that the last item represented furs and jewellery valued at a much higher figure. The affidavit continued: "Total estimated value of gifts inter vivos £44,000."

The affidavit also showed that the deceased took out policies on his life in favour of the widow under the Married Women's Property Act worth some £20,000. It appeared soon after his death that the extent of the claims likely to be made against the estate far exceeded those mentioned in the Inland Revenue affidavit. Numerous clients of the deceased entered claims against the Law Society to be indemnified against misappropriations by him of moneys entrusted to him as a solicitor, and the Law Society employed a chartered accountant, one Ridsdale, to investigate these. He gave evidence and swore that, though the investigations were by no means complete, the misappropriations amounted to something like half a million pounds. He stated that at the end of 1954, before the second marriage, the minimum of the claims was £171,000, and that the assets were then about £21,000, and that misappropriations had since proceeded on an ever-increasing scale. He said, further, that there was no chance of solvency, however much might be recovered in the present proceedings, and any other claims that there might be to recover moneys in the hands of third parties.

On April 23, 1958, the executors applied ex parte to have the assets administered in bankruptcy. That application was acceded to on the same day. On June 26, one Wilson, the partner of Ridsdale, was appointed trustee. The trustee claimed the return by the widow of the property Peppermills and all its contents sworn by the Inland Revenue affidavit to have been given to her. Both these requests were refused. The widow then enlarged her claims by laying claim to the contents of the flat, which she had sworn to belong to the estate. These contents she had removed to Peppermills, where they were at the date of the proceedings. The action against her in the Chancery Division was begun by writ dated July 25, 1958, and the notice of motion in bankruptcy by the trustee was dated August 15. The action concerned Peppermills and the motion the chattels. The trustee's first contention in both cases was that there were no valid gifts by the deceased, and that the widow held both house and chattels as trustee and not beneficially. By way of alternative, the trustee claimed first to recover both land and furniture under section 172 of the Law of Property Act, 1925, and by way of further alternative, to recover the property under section 42 of the Bankruptcy Act, 1914. The last claim was not pursued.

The facts as found by the court, leading up to the purchase of the house were as follows: The widow, a young woman of

Italian nationality, then known as Cesira Buran, came to this country from her native Udine in 1952 to act as cook in a house in Flood Street, Chelsea, then the property of a Mrs. Murray and the place where the deceased was then living. The widow, in evidence, said that she first got to know her husband in the middle of 1953, and that he first spoke to her of marriage towards the end of 1954 when he proposed to her and she accepted him. They then removed from Flood Street and went to live in a flat at Park West and two or three weeks later were married. She said that before this, but after she had become engaged to him, the husband spoke of a house, saying that he would like to buy a house for her, but that the only thing settled was that it should be a country house. He apparently took her about looking at houses and in December, 1954, first saw a house in Kent, then known as Lamberhurst Manor. After the marriage they decided to buy it and she knew no more about it until the purchase was an accomplished fact, when he said: "This is a house for you." As to money, she was a young woman without means, and was first drawn into his financial orbit when he authorized her in October, 1954, to sign cheques on what he called a household account with Barclays Bank, Sevenoaks. In instructing the bank he described her as his housekeeper. She drew a number of small cheques on this account during October and November, 1954. Immediately before the marriage the deceased opened two accounts in the joint names of himself and the widow, on which either could draw. One was styled the household account and on this she drew cheques occasionally. On the other she only drew one cheque for £200 for the purchase of some shares. This was made out for her by the deceased and signed at his request. He made her no allowance but supplied her with cash when she wanted it, and gave her lavish presents of furs and jewellery from time to time. She said that she was free to draw on both accounts at her wish. Soon after the marriage the purchase of Lamberhurst Manor was decided upon and the contract was signed on February 14, 1955. This is a contract between the vendor and the deceased, who agreed to buy the property for £15,500 and in addition certain fitted carpets and so forth at a valuation. The deposit of £1,550 was drawn by the deceased from his account with his firm. On the same day he wrote to the bank in these terms: "Under a contract of marriage with "Mrs. Eichholz I am providing a house for her and am buying "Lamberhurst Manor from Sir Thomas Overy. The cost is "£15,500. I should like to borrow £7,500 from Barclays repay-"able at call, but on the understanding that in ordinary "circumstances I pay it off at the rate of £1,500 per annum. At "the same time it is relevant to say that as a result of a "redistribution of certain interests I should be able within two "months to add to the securities normally lying with you "additional ones to a total of some £9–£12 thousand. I expect "to arrange for the completion of the house purchase about

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"March 31. I should be glad to hear that my proposal for a "loan on the security of the house without any specific additional "collateral is acceptable."

He did not complete the transaction as there proposed, but instructed the bank to sell certain bearer securities, which were later discovered to be the property of his clients, and to credit the joint account with the proceeds. The transaction was completed on March 15, 1955, by a conveyance by which, after reciting, contrary to the fact, that there had been an agreement with the widow for the purchase, the property was conveyed to her in fee simple. As appeared from this document the deceased had by this time decided to call the house Peppermills, that being, according to the widow, its old name which he said he preferred. He did not ask her opinion about it. There was no documentary evidence to indicate why the conveyance was made in that way. The deceased was no party to it, nor was there any recital that it was made by his direction. His Lordship inferred that the deceased orally instructed his partner, who had acted for him, to draw the conveyance in that way, and that the vendor had raised no objection. The balance of the purchase-money, which amounted to some £15,000, was provided by a banker's draft debited to the joint account. The bearer securities had already been sold, but owing to settling dates on the Stock Exchange the proceeds, amounting to some £18,000, were not credited to the joint account until March 23. At the date of the conveyance the joint account was already some £3,000 overdrawn. The overdraft was reduced to some £500 on March 23, and thereafter till the death of the deceased was sometimes in credit and sometimes overdrawn. At his death it was in credit and afterwards was drawn on by the widow for her own purposes until March 25, 1958, when she reimbursed her drawings since her husband's death and the balance passed to the trustee. This, his Lordship found, to be an acknowledgement by her that she had no beneficial interest in the moneys in that account.

From the time of the marriage onwards the deceased and the widow from time to time purchased furniture and so forth for the house, and they went into occupation in June, 1956, and so remained until his death. The widow was the rated occupier and the bills for services were addressed to her, but she said in evidence that she had nothing to do with that side of the business, and that her husband attended to all such matters and paid the servants and the household bills himself, sometimes, no doubt, out of the joint account. The property was insured in her name, but he paid the premiums. At the date of the present proceedings the house had been sold under an arrangement between the parties, and some few of the chattels had been sold by or were in the possession of Messrs. Christie, Manson & Woods, while the rest were to be sold by auction on the premises shortly before completion and the proceeds paid into a joint account to await the result of the proceedings.

Charles Russell Q.C. and *Muir Hunter* for the trustee in bankruptcy.

Harold Christie Q.C., *Andrew Martin* and *E. W. H. Christie* for the widow.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Barrack* v. *McCulloch* *; *Nottinghamshire County Council* v. *Middlesex County Council* †; *In re Gates* ‡; *Bristol Tramways Carriage Co.* v. *Fiat Motors Ltd.* §

HARMAN J. The first question to be considered in the circumstances I have related is whether in connexion with the house there was a gift by the deceased to the widow. This was argued upon the footing that the house was conveyed by the vendor to her upon an orally given direction by her husband. An alternative possibility is that the recital in the conveyance is correct, that he entered into the contract as her agent, and provided her with both the deposit and the balance of the purchase price. I propose to consider the first alternative. Here the parties being husband and wife and the conveyance being in her favour there is a presumption, in the absence of evidence to the contrary, that this was an advancement by him to her, rebutting the ordinary presumption of a resulting trust which arises when property is bought in the name of B and the purchase-money provided by A. It is true that this presumption of advancement in the case of a family asset, like a house, is nowadays not considered a very strong one and may be easily rebutted—see the judgment of Parker L.J. in *Silver* v. *Silver*.[1] There must, nevertheless, be some evidence to contradict it. Here there is considerable evidence of an intention to make a gift. First, that of the widow herself, which no doubt must be jealously scrutinized, but is not inadmissible. Next there is the deceased's letter of February 14, 1955, which I have already read, and which states explicitly that he is providing her with a house. Thirdly, the purchase-money was paid out of the joint account in which she had, on the face of it, a joint interest. Nor must it be forgotten that he must have been well aware at the time that he was hopelessly insolvent; which makes it the more likely that he should wish to put the joint home beyond his creditors' reach. On the other side there is no direct evidence beyond the fact that he treated the house as his and paid all the rates, taxes, and expenses such as electricity and the gardeners and servants. This seems to me quite consistent with a gift. There was also a cottage bought in the widow's name after the marriage, which the deceased later resold without asking leave, and without accounting to her for the proceeds. She admitted that she knew this and made no protest, and it was argued that I ought to infer

* (1856) 3 K. & J. 110.
† [1936] 1 K.B. 141.
‡ [1930] 1 Ch. 199.
§ [1910] 2 K.B. 831.
[1] [1958] 1 W.L.R. 259, 265; [1958] 1 All E.R. 523.

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from this that the same thing would have happened if he had wished to resell Peppermills. I decline to draw this inference. There may well have been no advancement as regards the cottage, or she may have been unwilling to insist on her rights against a husband who was treating her with lavish generosity. Lastly, it was argued that he was in fact being generous not at his own expense, but at that of his defrauded clients, and that no presumption ought to be relied upon which involved a fraud. No authority was cited for this proposition and I feel bound to reject it. Whether the true owners of the securities sold to provide the purchase-money could follow it into the widow's hands is not a question which arises here. Moreover, it appears that they have all put in proofs against the trustee. I hold that this was a gift of the house to the widow. If the second alternative were to be accepted the position seems to me to turn out exactly the same.

The next question is whether the gift was voluntary or made for good consideration. It was not suggested that the widow did not act in good faith or that any knowledge or notice of the deceased's insolvency ought to be imputed to her. It was argued for the widow that the gift was made in consideration of marriage. No such suggestion was made before the hearing, but I then allowed an amendment of the defence to raise it. The assertion of gift has been consistently made on oath by the widow, from the Inland Revenue affidavit onwards through several affidavits in these proceedings and on her examination in the bankruptcy proceedings: nowhere is it suggested that consideration was given. The claim, therefore, must be jealously scrutinized. In the witness-box the widow said that no mention of a house was made before she had agreed to marry the deceased, and that she did not marry him on the strength of a promise to give her one. The highest at which she put it was that when they were engaged he said that they would have a house in the country which would be hers. No decision to buy Peppermills was made till after the marriage. She said, moreover, that when her husband told her the house was hers it was a surprise to her. She would speak of it, she said, as "our house," but he corrected her saying, "your house." So far from proving that the gift was made in consideration of the marriage this testimony points the other way. The only serious evidence in support is in the already quoted letter of the deceased of February 14, 1955, which begins: "Under a contract of marriage with Mrs. Eichholz I am providing "a house for her," etc. This does not say when the contract was made: it may have been after marriage, and indeed it must have been if it was a contract to provide Peppermills, for that house was not decided on till February, 1955. This letter is altogether too ambiguous to support a contract in consideration of marriage. It was rather faintly suggested that consideration was given because the purchase-money was raised by a loan on a joint account for which the widow was liable, but the facts are that

the securities which provided the purchase-money were already sold on the husband's order when the loan was made and the wife never was at risk. This point, moreover, is not open on the pleadings. Accordingly, I reject the argument that there was any consideration for the gift.

The next question is whether the trustee can set the transaction aside. It was admitted that in this court he could not rely on section 42 of the Bankruptcy Act, 1914, because of the decision of the Court of Appeal in *In re Gould.*[2] I will read the headnote: "Section 47 of the Bankruptcy Act, 1883, which "avoids certain voluntary settlements executed by a bankrupt, "does not apply to the administration of the estate of a deceased "insolvent by the Court of Bankruptcy under section 125 of the "Act." So held by the Court of Appeal, affirming Cave J. The trustee then relied on section 172 of the Law of Property Act, 1925, which is in these terms: "(1) Save as provided in this "section, every conveyance of property, made whether before or "after the commencement of this Act, with intent to defraud "creditors, shall be voidable, at the instance of any person "thereby prejudiced. (2) This section does not affect the opera-"tion of a disentailing assurance, or the law of bankruptcy for "the time being in force. (3) This section does not extend to any "estate or interest in property conveyed for valuable considera-"tion and in good faith or upon good consideration and in good "faith to any person not having, at the time of the conveyance, "notice of the intent to defraud creditors." This section replaced 13 Eliz. 1, c. 5, which was repealed by the Act of 1925. The Elizabethan statute is, as one would expect, couched in very different terms. It is styled as "An Act against fraudulent "deeds, alienations, etc." and the long title is: "For the "avoiding and abolishing of feigned, covinous and fraudulent "feoffments, gifts, grants, alienations, conveyances, bonds, suits, "judgments and executions, as well of lands and tenements, "as of goods and chattels, more commonly used and practised "in these days than hath been seen or heard of heretofore: which "feoffments, gifts, grants, alienations, conveyances, bonds, suits, "judgments and executions, have been and are devised and "contrived of malice, fraud, covin, collusion or guile, to the end, "purpose and intent, to delay, hinder, or defraud creditors and "others of their just and lawful actions, suits, debts, accounts, "damages, penalties, forfeitures, heriots, mortuaries and reliefs, "not only to the let or hindrance of the due course and execution "of law and justice, but also to the overthrow of all true and "plain dealing, bargaining and chevisance between man and man, "without the which no commonwealth or civil society can be "maintained or continued." The Act then provides: "Be it "therefore declared . . . that all and every feoffment, gift, grant, "alienation, bargain and conveyance of lands, tenements,

[2] (1887) 19 Q.B.D. 92.

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"hereditaments, goods and chattels, or of any of them, or of any "lease, rent, common or other profit or charge out of the same "lands, tenements, hereditaments, goods and chattels, or any of "them, by writing or otherwise, and all and every bond, suit, "judgment and execution, at any time had or made sithence the "beginning of the Queen's Majesty's reign that now is, or at any "time hereafter to be had or made, to or for any intent or "purpose before declared and expressed, shall be from henceforth "deemed and taken (only as against that person or persons, his or "their heirs, successors, executors, administrators and assigns, and "every of them, whose actions, suits, debts, accounts, damages, "penalties, forfeitures, heriots, mortuaries and reliefs, by "such guileful, covinous, or fraudulent devices and practices, as is "aforesaid, are, shall or might be in anywise disturbed, hindered, "delayed or defrauded) to be clearly and utterly void, frustrate, "and of none effect; any pretence, colour, feigned consideration, "expressing of use, or any other matter or thing to the contrary "notwithstanding."

There is no doubt that the Statute of Elizabeth was available after a man's death to his creditors to recover from a volunteer property of whatever kind, including, after the passing of 1 Vict. c. 110 (Judgments Act), cash. This sufficiently appears from the orders cited in Seton, Judgments and Orders, 7th ed., p. 2280. The action must be brought by a creditor in a representative capacity and was not available to executors: see Kerr on Receivers, 7th ed., p. 305, and the cases cited on that page. It was not necessary to prove a fraudulent intent. The mere fact of insolvency was enough by itself: see Lord Hatherley's judgment in *Freeman* v. *Pope*.[3] The headnote to that case says: "When a settlement is not founded upon valuable consideration, "it may be set aside without proof of actual intention to defeat "or delay creditors, if the circumstances are such that the "settlement necessarily would have that effect; but, semble, the "mere fact that it has, in the event, prevented a creditor, who "was such when it was made, from obtaining payment of his "debt, is not of itself sufficient to enable him to set it aside." Lord Hatherley L.C. says[4]: "The principle on which the statute "of 13 Eliz. 1, c. 5, proceeds is this, that persons must be just "before they are generous, and that debts must be paid before "gifts can be made. The difficulty the Vice-Chancellor seems to "have felt in this case was, that if he, as a special juryman, had "been asked whether there was actually any intention on the "part of the settlor in this case to defeat, hinder, or delay his "creditors, he should have come to the conclusion that he had "no such intention. With great deference to the view of the "Vice-Chancellor . . . it appears to me that this does not put "the question exactly on the right ground; for it would never "be left to a special jury to find, simpliciter, whether the

[3] (1870) 5 Ch.App. 538. [4] Ibid. 540.

"settlor intended to defeat, hinder, or delay his creditors, "without a direction from the judge that if the necessary effect "of the instrument was to defeat, hinder, or delay the creditors, "that necessary effect was to be considered as evidencing an "intention to do so. A jury would undoubtedly be so directed, "lest they should fall into the error of speculating as to what "was actually passing in the mind of the settlor, which can "hardly ever be satisfactorily ascertained, instead of judging of "his intention by the necessary consequences of his act, which "consequences can always be estimated from the facts of the "case." Moreover, if the assets were considered to remain as part of the estate of the insolvent, then the person holding them is treated as executor de son tort: see May on Fraudulent Conveyances, 3rd ed. (1908), p. 18. That says: "When a man "makes a gift of goods which is fraudulent and void against his "creditors, and dies, he is considered to have died in full possession, with respect to the claims of the creditors: and the goods "are therefore assets in the hands of his personal representatives, "as to creditors. And as such a transfer is void at law, the "property becomes, at the death of the transferor, legal—and "not merely equitable—assets for creditors; for, the deed being "treated, as respects the creditors, as if it had never existed, "the property comes to the executor virtute officii. As any "intermeddling with a deceased person's effects, by one who is "not his duly constituted personal representative, makes the "latter an executor de son tort, and as goods fraudulently "alienated by a deceased person in his lifetime remain part of "his estate at his death, possession taken by the fraudulent "grantee will make him executor de son tort." In my judgment, all this continues to be good law under section 172 of the Law of Property Act, 1925, and it was at a late stage in the hearing admitted, though it was earlier strenuously contested, that the death of the fraudulent person makes no difference to his creditors' rights.

The defence ultimately rested on two points: first by an extension of the doctrine of *In re Gould* [5] it was argued that no such action lay after an order had been made under section 130 of the Bankruptcy Act, 1914 (which, for this purpose, may be taken to be equivalent to the similar sections of the Bankruptcy Acts of 1869 and 1883). Secondly, it was said that here there was no conveyance which could be set aside in the absence of any available written document. The first point is a strange one if good, for it means that the widow by making an application in bankruptcy ex parte and without notice to her husband's creditors, can put the property she acquired in fraud of them out of their reach. I can see no good reason why the *In re Gould* [6] doctrine should be applied to section 172. The headnote in that case is correct in stating that the decision was merely that the

[5] 19 Q.B.D. 92.

[6] Ibid.

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rights of a trustee in bankruptcy under section 42 of the Act of 1914 are not conferred on a trustee appointed under section 130. In other words, that part of the bankruptcy law is not imported by section 130 so as to be available where a man dies without being declared a bankrupt. It was said that some of the reasons expressed in the judgment in *In re Gould* [6] are equally applicable to section 172. The effect of section 130 was said to be not to enlarge the assets, but only to vary the creditors' rights, and so Cave J. says.[7] That was a motion in proceedings similar to the present, and Cave J.,[7] quoting from Fry J. in *In re D'Epineuil* [8] said [9]: "But, said Fry J., 'the words of the section are, that the "'rules of bankruptcy are to be applied in the administration of "'the assets; the assets in this case include only the equity of "'redemption of the goods comprised in the bill of sale; that may "'be administered as part of his estate; what belonged to other "'persons cannot be so administered . . . I grant this application "'on the ground that the section is not intended to enlarge the "'assets to be administered, but only to vary the rights of the "'persons entitled to the assets.'" One reason for the decision was that no such right existed in an administration by the Court of Chancery, and that it would be anomalous to import it into an administration in bankruptcy. This reason, at any rate, does not apply to proceedings under section 172, and in fact that section has nothing to do with bankruptcy. A man whose estate is being administered under section 130 of the Bankruptcy Act cannot properly be described as a bankrupt. It would, indeed, be anomalous if proceedings under section 172 would lie while a Chancery administration was proceeding (as *Freeman* v. *Pope*,[10] already cited, clearly shows it does, and as indeed is also shown by *In re Mouat* [11] and *Taylor* v. *Coenen* [12]), but should cease to lie because the aid of section 130 was called in to regulate the creditors' rights. I reject this argument.

For the second point the difference in language between the Statute of Elizabeth and section 172 was relied on. This has given me more difficulty. The former statute expressly speaks of "by writing or otherwise," whereas the word "conveyance" in the modern statute no doubt suggests writing. It is to be remembered, however, that the section is dealing with property of all kinds, real as well as personal. That is shown in the definition clause, section 205 (xx): "'Property' includes any thing in "action, and any interest in real or personal property." So conveyance cannot be confined to real estate or chattels real, but must apply to many kinds of property passing by delivery. Moreover, this is a consolidating Act and is not to be taken as making an alteration in the law unless the words admit of no other interpretation—see Scrutton L.J. in *Gilbert* v. *Gilbert*,[13] quoting

[6] 19 Q.B.D. 92.
[7] Ibid. 94.
[8] (1882) 20 Ch.D. 217, 218.
[9] 19 Q.B.D. 92, 94.
[10] 5 Ch.App. 538.
[11] [1899] 1 Ch. 831.
[12] (1876) 1 Ch.D. 636.
[13] [1928] P. 1, 8.

Sargant J. The Lord Justice says [14]: "The question is whether "words in an Act consolidating the law have the effect of "amending the law. The presumption with which one starts is "that a consolidating Act is not intended to alter the law. An "example of that rule is to be found in *Mitchell* v. *Simpson*,[15] "in which Fry L.J. said: 'The Sheriffs Act, 1887, is a con-"'solidating Act, and does not profess to amend or alter the "'provisions of the Acts consolidated. Prima facie, therefore, "'the same effect ought to be given to its provisions as was "'given to those of the Act for which it was substituted.' "It may be, however, that the language of the Act is so clearly "different from that of the previous statute as to bring about an "alteration in the law, as in *MacConnell* v. *E. Prill & Co.*,[16] "where Sargant J. said [17]: 'No doubt the prima facie presump-"'tion in the case of a consolidating Act, such as the present Act "'of 1908, is that the legislature intended to reproduce the "'existing position, and my first inclination would be to hold "'that, as under section 129 (3) of the 1862 Act, any notice "'is sufficient which sufficiently informs shareholders of the "'intention to act by way of extraordinary resolution. But this "'prima facie view must yield to plain words to the contrary.' "

To the like effect is the view of Romer L.J. in *In re Turner's Will Trusts, District Bank Ltd.* v. *Turner*.[18] The Lord Justice says this [19]: "For this purpose it is of importance to observe that "the Trustee Act, 1925, is a consolidation Act. It is intituled "'An Act to consolidate certain enactments relating to trustees "'in England and Wales.' It is therefore extremely unlikely, to "say the least of it, that it effected any substantial change in the "pre-existing law."

The language of the two sections is, of course, strikingly different. Mr. Christie drew my attention to the judgment of du Parcq L.J. in *Westminster Bank Ltd.* v. *Riches*.[20] His Lordship was considering the Law Reform Act, 1934, which repealed part of the Civil Procedure Act, 1833, and he said [21]: "Citations from cases referring to sections 28 and 29 of the Civil "Procedure Act, 1833, are, in my opinion, of doubtful assistance. "Indeed, I am of opinion that when the legislature has repealed "a statute and has not re-enacted it, but replaced it with a new "enactment in different terms, it is in general a salutary rule "that such case law as has accumulated round the repealed "statute should be regarded as having expired with it." That, however, was not a case about a consolidating Act. It might have been quite different if section 172 of the Law of Property Act, 1925, had been part of the Law of Property Act, 1922, which, of course, made revolutionary changes in the law. It would, indeed, be a revolution in law if the effect of section 172

[14] [1928] P. 1, 8.
[15] 25 Q.B.D. 183.
[16] [1916] 2 Ch. 57.
[17] Ibid. 63.
[18] [1937] Ch. 15.
[19] Ibid. 24.
[20] [1945] Ch. 381.
[21] Ibid. 388.

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were to enable a man to convert the property which he wished to dispose of in fraud of his creditors into (say) bearer bonds, and to hand those to volunteers with impunity.

There is, however, a further stumbling block in section 205, the definition section, which reads in this way: "(1) In this Act, "unless the context otherwise requires, the following expressions "have the meanings hereby assigned to them respectively, that "is to say:— . . . (i) 'Conveyance' includes a mortgage, charge, "lease, assent, vesting declaration, vesting instrument, dis-"claimer, release and every other assurance of property or of an "interest therein by any instrument, except a will; . . ." Reliance was placed on this to show that "conveyance" of necessity implies writing. It is possible to confine the allusions to instruments to the latter part of the phrase, though the word "other" is against this. Some of the words in the earlier part do not necessarily import writing, for instance, "charge," "lease" (three years), "assent" (as applied to chattels). Apart from this, the clause is not truly one of definition. It will only operate where the context allows. It uses the word "includes," and this implies "inter alia" and is a word apt to extend the normal meaning of the word "conveyance": see Lord Watson, delivering the judgment of the Privy Council in *Dilworth* v. *Commissioner of Stamps*.[22] He was there considering an Act which had this term in it: "In this Act, the term 'charitable purposes' includes "devises, bequests and legacies of real or personal property," and so on. Lord Watson said[22]: "Section 2 is, beyond all "question, an interpretation clause, and must have been intended "by the legislature to be taken into account in construing the "expression 'charitable devise or bequest,' as it occurs in sec-"tion 3. It is not said in terms that 'charitable bequest' shall "mean one or other of the things which are enumerated, but "that it shall 'include' them. The word 'include' is very "generally used in interpretation clauses in order to enlarge "the meaning of words or phrases occurring in the body of the "statute; and when it is so used these words or phrases must "be construed as comprehending, not only such things as they "signify according to their natural import, but also those things "which the interpretation clause declares that they shall include. "But the word 'include' is susceptible of another construction, "which may become imperative, if the context of the Act is "sufficient to show that it was not merely employed for the "purpose of adding to the natural significances of the words "or expressions defined. It may be equivalent to 'mean and "'include,' and in that case it may afford an exhaustive explana-"tion of the meaning which, for the purposes of the Act, must "invariably be attached to these words or expressions."

In my judgment the first meaning ought to be attached here to the word "include." On the whole I am of opinion that in a consolidating Act I should be entitled to say that writing is

[22] [1899] A.C. 99, 105.

not a sine qua non for the word as it appears in section 172, though I do not pretend that the wording of the section is happy if so construed. I was reminded that dispositions void under section 172 have for many years been commonly described as "fraudulent conveyances," whether the disposition in question be oral or in writing. For example, the title of May, the leading book, reads on the spine "May on Fraudulent and Voluntary "Dispositions," but when one turns to the title page one finds "Law of Fraudulent and Voluntary Conveyances; being a Treatise "on the Statute of Elizabeth." In a modern textbook, Kerr on Receivers, 7th ed., p. 304, a view is expressed on this subject in these terms: "The section [section 172] applies to every "conveyance of property. 13 Elizabeth, Chapter 4, employed "several words more or less synonymous with conveyance and "several words more or less synonymous with property. There "is no reason to suppose that the new section is in any respect "narrower or wider than the old statute. Early decisions under "the statute limited its application to property which could be "taken to satisfy debts, and the long historical development by "which almost all property can now be taken in satisfaction of "its owner's debts is traced in the preceding edition of this book. "It is now safe to say that the section applies to any property." Being the writer of a textbook, the author no doubt felt a little more confident than those who have to come into court and argue the point, but that was his opinion.

In the end, however, I have come to the conclusion that the point is a false one. There is no want of writing; it exists in the assurance to the wife of March 15, 1955. It is true that, quoad the vendor, this was made for valuable consideration, that the deceased was not a party, and that no direction by him is recited in it. In fact, however, the vendor having contracted with the deceased for the sale of the property to him, was no more than a trustee with a vendor's lien; the equitable interest was in the husband under the contract. The assurance passed to the widow not only the vendor's legal estate but the deceased's equitable interest, and it is this which can be recovered by the creditors. The deed should be set aside quoad the creditors. This proposition has the authority of a decision of Page Wood V.-C. in *Barton* v. *Vanheythuysen*,[23] a case under 13 Eliz. 1, c. 5, where that course was taken. I quote from the sidenote[23]: "A debtor "having contracted to purchase an estate, caused the conveyance "to be made to trustees, and trusts to be declared by deeds, "dated in March, 1850, which recited the agreement of the "debtor for the purchase, and that the conveyance to the trustees "was by his direction, and declared the trusts to be for the sale "of the property, and retaining the proceeds for the benefit of "the wife and children of the debtor. By one of the deeds of "March, 1850, the debtor also assigned to the same trustees all

[23] (1853) 11 Hare 126.

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"the furniture in certain houses (one of which was on the pur-"chased estate), upon the same trusts, for his wife and children." There are other matters in the case, but it does not appear that the purchaser of the property, Richard Edward Vanheythuysen, was a party to the deed. It merely states [23]: "By a deed, dated "March 25, 1850, reciting that he had contracted to purchase "such estate, the premises were 'by the direction of the said "'R. E. Vanheythuysen' conveyed, by the vendor, unto and "to the use of the" defendant trustees. The Vice-Chancellor deals with it in this way [24]: "Two objections have been raised "to the claim of Messrs. Stone under the deed of November 29, "1851, and by force of the statute 27 Eliz. 1, c. 4. It was first "said that the conveyance of March 25, 1850, did not vest any "property in Vanheythuysen, and that it was not a grant or "settlement of real estate by him, so as to bring the case within "the provisions of the statute 27 Eliz. 1 [that is the correspond-"ing statute about subsequent encumbrance] by which such a "conveyance would be subsequently avoided. It was argued "that the purchase of an estate by a payment in the name of a "child was not within the statute and that Vanheythuysen did "not, in this case, actually acquire the estate, but that it was "in effect nothing more than giving the money to the wife and "child, who by that means bought the estate; and text-writers "have questioned whether such a purchase would be within the "statute. But, in the present case, the conveyance recites that "Vanheythuysen had agreed to purchase the estate from the "vendor, and thereby acquired the equitable interest in the "estate; and the conveyance is, therefore, clearly a conveyance "of his equitable interest in this estate to volunteers." The decree in that case was in these terms: "This court doth declare "that the deed of conveyance of the 25th day of March, 1850 "(so far as the same relates to the equitable fee simple . . . of "Richard Edward Vanheythuysen, deceased, in the freehold . . . "lands and premises therein comprised) . . . are void as against "[the creditors] in the second-mentioned clause, claiming under "the deed or mortgage . . ." It seems to me that with a little adaptation a declaration in those terms would exactly fit the present circumstances.

There remains the question whether the trustee under section 130 of the Bankruptcy Act, 1914, can maintain the action which, as I have said, was, under the old statute, an action brought by a creditor in a representative capacity, and if after a decree for administration in Chancery brought with the leave of the court. It was argued that the judgment in *In re Gould* [25] shows that the trustee under section 130 is merely appointed to administer the assets already included in the estate, and not to enlarge those assets by getting in property in other hands. It seems doubtful whether those statements, which were not necessary for the

[23] (1853) 11 Hare 126.
[24] Ibid. 129.
[25] 19 Q.B.D. 92.

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decision, are consistent with the other passages I have read, which show that property fraudulently conveyed is not considered to remain part of the estate of the deceased and that those in whose hands it was were treated as executors de son tort. It was also said that in bankruptcy only the trustee may bring proceedings: see a decision of Upjohn J. in *In re Crossley*.[26] This is no doubt true, but this is not a bankruptcy in the ordinary sense of the word, and if, contrary to my view, the trustee is not the proper party to bring the action, I see no reason why this defect should not be remedied by adding a representative creditor as plaintiff. This objection, in my view, is nothing more than an objection as to parties and can, if necessary, be remedied with the leave of the court, which I should be prepared to give. In my judgment, however, it is not necessary and the action will lie as it stands.

It follows from what I have said that the trustee succeeds in both action and motion. There is no need to distinguish between the chattels given to the widow and the chattels which remained the husband's property. There may be some which were wedding presents or the like which the widow can retain, and I propose to give liberty to apply for an inquiry on this question if there are differences which cannot be composed.

There will have to be two orders, one in bankruptcy and one in Chancery.

Orders accordingly.

Solicitors: *Sidney Pearlman; Robin Howard & Co.*

P. P.

[26] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 296.

[COURT OF APPEAL.]

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1958 *Dec.* 15, 16.

1959 *Jan.* 23.

Jenkins, Romer and Pearce L.JJ.

[Plaint No. N. 1672.]

Landlord and Tenant—Equitable tenancy—Holding over under agreement—Agreement subject to condition precedent—Condition unfulfilled by tenant—Whether tenant has equitable tenure.

County Court—Jurisdiction—Landlord and tenant—Application for new tenancy of business premises—Incidental question whether tenant entitled to specific performance—Premises over £500 *in value—Rateable value less than* £500*—Landlord and Tenant Act,* 1954, *s.* 63 (2).

Landlord and Tenant—Business premises (security of tenure)—"Competent landlord"—Tenant and mesne landlord holding over under Act of 1954*—Whether "competent landlord"—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30, 44 (1), *Sch.* 6 (1).

Before 1949 B. G. Ltd. (the "landlords") and Mrs. P., predecessor in title of Mrs. C. (the "tenant") had occupied business

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premises, Nos. 23a and 23 respectively, as tenants of the Westminster estate trustees. In 1949 the trustees granted to the landlords a lease of both premises for seven years from Michaelmas; the landlords granted to Mrs. P. a sublease of No. 23 for a like period less three days, to which the tenant succeeded. After the coming into force of the Landlord and Tenant Act, 1954,[1] both parties held over under the protection of the Act. In January, 1957, the trustees offered to the landlords a new lease of No. 23 for 10½ years, subject to their carrying out certain repairs, which offer was accepted in writing.

The landlords then offered to the tenant a sublease of No. 23a, which she refused on the ground that the accommodation was too small. On October 30, 1957, the tenant applied to the county court under the provisions of the Act of 1954 for the determination of the terms of a new sublease of No. 23. The landlords opposed the application on the grounds that pursuant to section 30 (1) (*g*) they required to occupy the premises themselves, and that pursuant to section 30 (1) (*d*) they had offered suitable alternative accommodation; they first stated that they held an equitable tenancy of the premises under the agreement of January, but later stated in the alternative that they were tenants under the lease of 1949 as continued by the Act of 1954. Under advice, and with the temporary concurrence of the Westminster trustees, they deferred the execution of the prescribed repairs. The annual value of the premises was over £500.

The county court judge held that the landlords were holding under an equitable tenancy (on the principle of *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9) arising from the agreement of January, 1957, and so could not rely on section 30 (1) (*g*) as their interest had

[1] Landlord and Tenant Act, 1954, s. 30: "(1) The grounds on which a "landlord may oppose an application "under subsection (1) of section 24 of "this Act are such of the following "grounds as may be stated in the "landlord's notice under section 25 "of this Act or, as the case may be, "under subsection (6) of section 26 "thereof, that is to say:— . . . "(*g*) subject as hereinafter provided, "that on the termination of the "current tenancy the landlord intends "to occupy the holding for the purposes, or partly for the purposes, "of a business to be carried on by "him therein, or as his residence. "(2) The landlord shall not be "entitled to oppose an application on "the ground specified in paragraph "(*g*) of the last foregoing subsection "if the interest of the landlord, or "an interest which has merged in "that interest and but for the merger "would be the interest of the landlord, was purchased or created after "the beginning of the period of five "years which ends with the termination of the current tenancy, and at "all times since the purchase or "creation thereof the holding has "been comprised in a tenancy or "successive tenancies of the description specified in subsection (1) of "section 23 of this Act."

S. 44 (1): ". . . in this Part "of this Act the expression 'the "'landlord', in relation to a tenancy "(in this section referred to as 'the "'relevant tenancy'), means the "person (whether or not he is the "immediate landlord) who is the "owner of that interest in the property comprised in the relevant "tenancy which for the time being "fulfils the following conditions, that "is to say—(*a*) that it is an interest "in reversion expectant (whether "immediately or not) on the termination of the relevant tenancy, and "(*b*) that it is either the fee simple "or a tenancy which will not come "to an end within fourteen months "or less by effluxion of time or by "virtue of a notice to quit already "given by the landlord, and is not itself in reversion expectant (whether "immediately or not) on an interest "which fulfils those conditions."

Sch. VI: "(1) . . . 'the competent "'landlord' means the person who in "relation to the tenancy is for the "time being the landlord (as defined "by section 44 of this Act) for the "purposes of Part II of this Act."

arisen within five years. He also held that the alternative accommodation was insufficient, and granted the tenant a sublease of No. 23.

The landlords appealed; the tenant cross-appealed, alleging that they were not a "competent landlord" within the meaning of the Act:—

Held, allowing the appeal, (1) that the tenure of the landlords was a holding-over from the lease of 1949 by virtue of the Act of 1954 and not an equitable tenure arising out of the agreement of 1957, as the necessary condition precedent of executing the prescribed repairs had not been complied with, so that the landlords were not excluded from relying on section 30 (1) (*g*); the principle in *Walsh* v. *Lonsdale* (supra) did not apply where an agreement for a lease was subject to a condition precedent which had not been fulfilled and had not been waived by the lessor.

Inland Revenue Commissioners v. *Earl of Derby* [1914] 3 K.B. 1186 approved.

(2) That the landlords were a "competent landlord" within the meaning of Schedule VI (1) to the Act, and as such entitled to oppose the grant of a new tenancy.

(3) That the county court judge was right in exercising jurisdiction under section 63 (2) of the Act of 1954, notwithstanding the provisions of the County Courts Acts, although the value of the premises exceeded £500, as he was not required to enforce any equitable right, but merely to decide whether or not such a right existed.

Foster v. *Reeves* [1892] 2 Q.B. 255 distinguished.

APPEAL from Judge Blagden, sitting at Westminster County Court.

The facts are taken substantially from the judgment of the court.

This was an appeal by the respondents, Brook Green Laundry Ltd. (hereinafter called "Brook Green") against an order of Judge Blagden dated May 22, 1958, whereby it was ordered that a new tenancy should be granted to the applicant, Mrs. Cornish, of the premises, 23 Lower Belgrave Street, Eaton Square, in the County of London. The tenancy directed by the said order to be granted was to be for a period of 10½ years less three days from Michaelmas, 1956, at a rent of £250 per annum from that date.

The premises, No. 23, Lower Belgrave Street, consisted of a ground floor and basement, and this accommodation had been occupied by Mrs. Cornish and by her mother (a Mrs. Paulin) before her for some 50 years for the purpose of a confectioners', newsagents', stationers' and tobacconists' shop. The premises immediately adjoining No. 23, and also consisting of a ground floor and basement, were known as No. 23a, Lower Belgrave Street and were and had for some years past been occupied by Brook Green.

The owners of the freehold interest in both 23 and 23a Lower Belgrave Street were the trustees of the Westminster settled estates (hereinafter referred to as "the trustees"). Before 1949 Mrs. Paulin held a direct tenancy of No. 23 from the trustees,

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but in that year the trustees granted a lease to Brook Green of both 23 and 23a for seven years from Michaelmas 1949. On May 10, 1950, Brook Green granted an underlease of No. 23 to Mrs. Paulin for the term of their own lease less the last three days. Accordingly, Brook Green's contractual lease of No. 23a expired on September 29, 1956, and the sublease of No. 23 (then vested in Mrs. Cornish) expired three days earlier. As, however, Brook Green were using No. 23a for business purposes, they became entitled in respect of their tenancy to the protection of Part II of the Landlord and Tenant Act, 1954, as also did Mrs. Cornish in view of her user of No. 23 as a shop. The result of this protection was to continue both the lease and the sublease until they were superseded by new tenancies or determined by appropriate notices served under the Act. Both Brook Green and Mrs. Cornish continued in occupation of their respective premises, and in November, 1956, certain tentative correspondence passed between them or their respective solicitors as to the granting of a further sublease to Mrs. Cornish on the assumption that Brook Green would obtain a new headlease from the trustees. Apart from this correspondence, no step was taken by any of the parties concerned until January 18, 1957, when the trustees' solicitors wrote to Brook Green enclosing a formal offer of a new lease. Some of the terms of the offer, which was partly printed and partly written, so far as material, were as follows: "Dear Sirs, 23, "Lower Belgrave Street. In answer to your application, we "hereby, on behalf of the special executors of the late Duke of "Westminster, make the following offer, namely, subject to your "first carrying out the works specified in the schedule hereto, "without prejudice to the obligation that the rent and covenants "under the headlease should be duly paid and performed up to "its expiration, a reversionary lease would (subject as after men-"tioned and to your written acceptance of these terms within the "time after specified) be granted to your company of No. 23, "Lower Belgrave Street, London, upon the following terms: "(1) The term of years to be 10½ years from Michaelmas Day, "1956, to Lady Day, 1967." Then after a reference to a cash payment, "the rent, as from September 29, 1956, to be £400 a "year. . . . (3) The property to be leased subject to all rights, ease-"ments and privileges of adjacent or neighbouring premises, and "the lease also to contain all such clauses and covenants as are "contained in a form marked (blank) dated January, 1957, "indorsed No. 23 Lower Belgrave Street and sent herewith for "perusal and return." Then by clause 5: "Your company to "carry out and complete the works mentioned in the schedule "hereto to the satisfaction in all respects of the lessors or their "estate surveyor by March 25, 1957, and thereupon and upon "payment of the costs above mentioned the lease to be granted "and taken up by your company." Then by clause 6 it was provided: "These terms (which are not transferable) are open to "your company's acceptance in writing, by affixing the company's

"seal with the usual formalities to the acceptance subjoined "and returning this form to us within three weeks from this "date." The schedule of works required were: "(1) Make "good the pieces of broken parapet oversailing course on the front "elevation of the premises. (2) Carry out such sanitary works "(if any) as may be necessary." Then the form of acceptance which appeared below and was filled in and dated February 4, 1957, and sealed by Brook Green, was: "We hereby accept the "foregoing offer and agree to carry out the said works, to take "up the lease upon tender thereof and to pay the costs as "mentioned."

The subsequent history of the matter down to the commencement of the present proceedings sufficiently appeared from the correspondence which passed between the solicitors acting respectively for Brook Green (Messrs. Goodman, Derrick & Co.), Mrs. Cornish (Messrs. Beddington, Hughes & Hobart), and the trustees (Messrs. Boodle, Hatfield & Co.). On February 12, 1957, Brook Green's solicitors wrote to Mrs. Cornish's solicitors: "Dear Sirs, 23, Lower Belgrave Street. Further to our letter "of November 28 last, our clients are in process of negotiating a "new headlease of these premises, but the negotiations are not "yet complete. In view of the fact that your client's lease will "already have expired, we would suggest that she remain in "possession for the time being as a monthly tenant but otherwise on the terms of the existing lease." On April 9, 1957, Brook Green's solicitors wrote to the trustees' solicitors: ". . . Further to our letter of 21st ultimo, our clients have now "considered this matter further, and at their request we enclose "herewith the original agreement which has been duly "signed. . . ."

On May 13, 1957, Brook Green's solicitors wrote to Mrs. Cornish's solicitors: ". . . We refer to our correspondence of "February last, and should state that our clients are still in "course of carrying out various negotiations in respect of the "renewal of their headlease. The headlease will in fact be back "dated to the expiration of the old one in September last, and "we feel therefore that we should mention to you that any fresh "arrangements entered into with your clients should take this "into account." On June 25, 1957, the trustees' solicitors wrote to Brook Green's solicitors: "We now enclose the draft lease for "your final perusal," and after a reference to insurance, the final paragraph says: "If the schedule of condition mentioned in "clause 3 has now been agreed between the surveyors for our "respective clients, you might be so kind as to insert its date "and let us have a copy which can be signed by us on behalf of "our clients." On July 4 there was a letter from Brook Green's solicitors to Mrs. Cornish with reference to alternative accommodation.

On July 8 Brook Green's solicitors wrote to the trustees'

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solicitors saying, inter alia: "In the meantime we enclose "herewith a copy of the schedule of condition, which we "understand has been agreed by the surveyors to both parties, "and you will no doubt wish to confirm this." On July 12 Mrs. Cornish's solicitors wrote to Brook Green's solicitors: "We refer "to your letter of the 4th instant and have now taken instruc-"tions. Our client feels that she could not carry on her business "in the part of the premises occupied by your clients and in these "circumstances we should be glad to have your proposals for a "new lease of the premises at present occupied by our client. "We have, solely for the protection of our client's interests and "not as any hostile step, served notice on the Duke of West-"minster as the competent landlord for the purposes of Part II "of the Landlord and Tenant Act, 1954, and enclose a copy of "that notice for your information. When sending the notice "to the Duke, we have informed him that we are in negotiation "with you and that the notice is served only for the purpose of "protecting the interests of our client."

On August 1 Mrs. Cornish's solicitors wrote to Brook Green's solicitors: "We should be glad if we might hear from you on this "matter. You will recall that you told us that your client had "agreed with the freeholder terms for the grant of a new lease "and it is, of course, desirable that we should similarly conclude "terms with you having regard to the period fixed by the Act." On August 9 Brook Green's solicitors replied: "We refer to your "letter of the 12th July in this matter. We acknowledge receipt "of a copy of a notice served on the Duke of Westminster. We "would suggest, with great respect, that this notice is mis-"conceived. Our clients' tenancy includes the part of the "premises occupied by them as well as the part sublet to your "client. As our clients' tenancy is continued automatically by "section 24 (1), and no statutory notice has been served either "by our clients or by the head landlords, our clients have a "reversion (section 65 (1)) expectant on your client's tenancy; "nor will their tenancy come to an end within fourteen months "or less by effluxion of time or by virtue of a notice to quit "already given by the landlord. Our clients are therefore 'the "'landlord' under section 44. If you agree with this point of "view, would you let us know whether you want us to treat the "notice as if it had been served on our clients or whether you "propose to serve a fresh notice. Meanwhile we are instructed "to offer your client formally, by way of alternative accommoda-"tion, the accommodation at present occupied by our clients for "a term of 10½ years (less 10 days) from September 29, 1956, "or from such other day as may become appropriate under the "provisions of the Act at a rent of £150 per annum exclusive "with full interior repairing obligations and otherwise on the "same terms as your current tenancy. Our clients propose to "occupy the accommodation now occupied by your client."

On August 19 Mrs. Cornish's solicitors wrote to Brook

Green's solicitors: " . . . We refer to your letter of the " 9th instant, but cannot accept your view that our notice " is misconceived." Then after certain other matters the last paragraph of the letter was: " Inasmuch as it appears " from your letter that your clients now have a new lease " of the whole of the premises, we shall be glad if you will " say whether they are prepared to grant to our client a " new tenancy of the part of the premises comprised in the " present tenancy of our client, for the term mentioned in your " letter under reply." On September 12 the trustees' solicitors wrote to Brook Green's solicitors: " We now enclose the counter- " part of the new lease for sealing on behalf of your client com- " pany and we also enclose a note of our charges and disburse- " ments in connection with the preparation and completion of the " lease. . . . You will remember that it was one of the conditions " precedent to the grant of the lease that your client should " carry out certain works. We have asked the estate surveyor to " let us know whether sufficient of these have been completed " to enable the lease to be granted and as soon as we have heard " from him we will communicate with you again."

On September 17 Mrs. Cornish's solicitors wrote to Brook Green's solicitors inquiring about the date of the lease or other instrument under which Brook Green now held the premises and the term thereof, and stating: " Having regard to the information " which you furnished to us, it would appear to us that the " interest of your clients in the premises must have been " 'created' within five years and we should be glad if you would " let us know whether you agree." The reply was that " Our " clients hold the premises by virtue of an agreement for lease " dated January 18, 1957, for a term of 10½ years from Michael- " mas Day, 1956, to Lady Day, 1967. We trust this is the " information that you require."

On October 30, 1957, Mrs. Cornish made an application under the Act of 1954 asking for the grant of a new tenancy of No. 23 Lower Belgrave Street pursuant to Part II of the Act. Originally the only respondents to the application were Brook Green, but on October 28, 1958, she joined the trustees as additional respondents. The trustees, however, took no active part in the proceedings. Paragraph 3 of the amended application was as follows: " The following are particulars of the termination of " the current tenancy: On July 12, 1957, the applicant requested " a new tenancy to commence on June 24, 1958, and on Septem- " ber 12, 1957, the first respondents gave notice that they would " oppose any application for the grant of a new tenancy."

On December 3, 1957, Brook Green put in an answer opposing Mrs. Cornish's application on the ground that on the termination of the current tenancy they intended to occupy No. 23 for the purpose of their business as a laundry to be carried on by them therein, and on the further ground that they had offered and were

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willing to provide Mrs. Cornish with, or secure the provision of, suitable alternative accommodation within the meaning of section 30 (1) (*d*) of the Act of 1954. Paragraph 3 of the notice of opposition as originally delivered stated that Brook Green were "tenants under an agreement for a lease having less than 14 "months unexpired at the date of termination of the applicant's "current tenancy," and stated that their immediate landlords were the trustees, but by amendment dated March 11, 1958, they introduced between the words "under" and "an agreement," the further words "a lease continued by virtue of section 26 of "the Landlord and Tenant Act, 1954, or alternatively under."

Between the date of the commencement of the application and its hearing, there was some further correspondence between the solicitors to the parties. On January 23, 1958, Brook Green's solicitors wrote to Mrs. Cornish's solicitors, saying: "We think "it fair to add that, despite the letter of September 18, 1957, "counsel has advised that what was therein referred to as an "agreement for a lease dated January 18, 1957, was in fact only "an offer to grant a lease if certain conditions were fulfilled and "that the true position may be that the respondents are holding "over under the Act pending the execution of the new lease; it "should, however, be said that the respondents have for some "time paid the higher rent. The document of January 18, 1957, "and all relevant correspondence, etc., will of course be disclosed "on discovery."

After further correspondence between the various solicitors regarding Brook Green's status as "competent landlords" under the Act, and the question of the execution of the repairs, on February 6, Mrs. Cornish's solicitors wrote to Brook Green's solicitors: "You will agree with us that, pending the confirmation "of the estate's surveyor that the work has been completed, the "question as to who is the competent landlord unfortunately still "remains open. It would, we feel sure you will agree, be a "waste of time and money to add the Grosvenor Estate trustees "as respondents to the proceedings if, as it appears likely to be "the case, the condition of the agreement for lease is likely to "be removed shortly. We, accordingly, suggest that the hearing "should be adjourned for a further month in order to allow time "for the grant of the lease to your clients whereby the position "will be beyond doubt." On February 17, 1958, the trustees' solicitors wrote to Brook Green's solicitors: "In view of the "desirability of the grant of the new lease to your clients, we "had hoped that the estate surveyor would by now have been "able to confirm to us that the works required under the offer "of terms had been carried out. He inspected the premises on "the 10th instant, however, and found that the broken over-"sailing course on the main parapet of the front elevation had not "yet been made good. Our clients are, however, in the circum-"stances prepared to agree that the grant of the new headlease "should be completed, provided that your clients will give an

"undertaking in the terms of the enclosed document to the effect "that the works required under the offer of terms will be carried "out by June 24 next."

Finally, on February 26, 1958, Brook Green's solicitors wrote to the trustees' solicitors, saying: "As we have explained to you, "the issues in the proceedings between our clients and Mrs. "Cornish are such that we have advised them that it would be "inadvisable at this stage for them to take up and complete a "new lease from your clients and that they should, if possible, "delay doing so until after the proceedings have been disposed "of. There is no doubt, however, of their intention to complete "the lease in due course and to carry out the necessary work "referred to in the schedule to the agreement for lease. With "regard to the decision by Mrs. Cornish to add your clients as "parties to the proceedings, we are, as we have already informed "you, emphatically of the view (and we are so advised by "counsel) that our clients are the competent landlords for the "purpose of the Landlord and Tenant Act, 1954, and that con-"sequently the addition of your clients as parties is entirely mis-"conceived and should not, we suggest, be used in any way to "bring pressure upon our clients to complete the lease im-"mediately. In those circumstances we would be very grateful "if you would obtain your clients' instructions on the matter "and confirm to us that they are prepared to leave the com-"pletion of the lease in abeyance for the time being. With "regard to the execution of the necessary work, our clients would "for similar reasons prefer this to be delayed, but are, if your "clients should so insist, prepared to make arrangements for it "to be carried out without delay."

As appeared from the correspondence Brook Green had "for "some time" paid to the trustees the higher rent of £400 per annum which was mentioned in the offer of January 18, 1957, but it was not known when they started to pay this higher rent.

The county court judge directed that a new sublease of No. 23 should be granted; the landlords appealed and the tenant cross-appealed.

John Montgomerie for the landlords.

Gabriel Cohen (*T. Michael Eastham* with him) for the tenant.

The following cases were cited in argument, but not referred to in the judgment: *Powell* v. *Cleland* [2]; *Epps* v. *Rothnie* [3]; *Fowle* v. *Bell* [4]; *Baker* v. *Sims* [5]; *Cunliffe* v. *Goodman* [6]; *British Movietonews Ltd.* v. *London and District Cinemas Ltd.* [7]

Cur. adv. vult.

[2] [1948] 1 K.B. 262; 63 T.L.R. 626; [1947] 2 All E.R. 672.

[3] [1945] K.B. 562; 61 T.L.R. 533; [1946] 1 All E.R. 146.

[4] [1947] K.B. 242; 62 T.L.R. 711; [1946] 2 All E.R. 668.

[5] [1958] 3 W.L.R. 546; [1958] 3 All E.R. 326.

[6] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[7] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

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January 23. ROMER L.J., reading the judgment of the court, after stating the facts, continued: As a result of the evidence which was called at the hearing, the judge was satisfied, and so held, first, that the alternative accommodation which Brook Green offered to Mrs. Cornish was in no way suitable to her requirements and, secondly, that Brook Green had established a genuine intention to occupy No. 23 (if Mrs. Cornish's tenancy was terminated) for the purposes of their business. This second finding by the judge would accordingly entitle Brook Green to rely on section 30 (1) (*g*) of the Act of 1954 as a ground of opposition to Mrs. Cornish's application, provided that they were her "landlords" and not disqualified from relying on it by reason of section 30 (2). [His Lordship read that subsection and continued:] The judge held that this subsection operated as a bar to Brook Green's attempt to defeat Mrs. Cornish's application by relying upon section 30 (1) (*g*), and it would be convenient to consider this aspect of the case before dealing with any other issue. The matter arises in this way. If the interest which Brook Green had in No. 23, Lower Belgrave Street when, on September 12, 1957, they gave notice that they would oppose Mrs. Cornish's request for a new tenancy, was no more than their interest, continued by virtue of the Act of 1954 as head lessees from the trustees under the lease of 1949, it is clear that such interest was outside the disqualifying provisions of section 30 (2). It was suggested, however, and the suggestion was accepted by the judge, that by reason of the offer of a new lease by the trustees to Brook Green in January, 1957, and Brook Green's acceptance thereof, communicated to the trustees on April 9, 1957, a new interest in No. 23 was created in Brook Green which superseded their previous interest; and that such interest was accordingly within the mischief of section 30 (2). The applicant's contention on this point depends on the application to the relevant events of 1957 of the principle of equity exemplified by the case of *Walsh* v. *Lonsdale*.[1] That principle was enunciated by Cotton L.J. in *Lowther* v. *Heaver* in the following terms[2]: "A tenant "holding under an agreement for a lease of which specific per- "formance would be decreed stands now in the same position as "if the lease had been granted. He is entitled only in equity, "it is true, to a lease, but being entitled in equity to have a lease "granted his rights ought, in my opinion, to be dealt with in the "same way as if a lease had been granted to him, and do not "depend upon its actually having been granted."

Now it is quite true that in their letter of September 18, 1957, Brook Green's solicitors informed Mrs. Cornish's solicitors that "our clients hold the premises by virtue of an agreement for "lease dated January 18, 1957, for a term of 10½ years from "Michaelmas Day, 1956, to Lady Day, 1967," and a statement to the like effect appeared in Brook Green's formal opposition

[1] (1882) 21 Ch.D. 9.

[2] (1889) 41 Ch.D. 248, 264.

before the same was amended. It seems to us, however, that Brook Green and their solicitors were quite mistaken in supposing that at any relevant moment of time they were entitled as against the trustees to what we may for the sake of convenience refer to as the *Walsh* v. *Lonsdale* equity. The offer which accompanied Messrs. Boodle, Hatfield & Co.'s letter of January 18, 1957, to Brook Green was not, perhaps, a model of lucidity, but one thing about it which is quite clear is that the offer of a new lease of 23, Lower Belgrave Street was conditional upon Brook Green "first carrying out the works specified in the schedule" to the offer. There was no evidence before the judge as to the extent or cost of the works which Brook Green were to do before they could require the trustees to grant them the new lease, but it is conceded that they had not been done by September 12, 1957, when Brook Green notified Mrs. Cornish that they would oppose her application. Accordingly, by that date (which would appear to be the relevant date—see *Diploma Laundry Ltd.* v. *Surrey Timber Co. Ltd.*[3]) Brook Green were not in a position to sue the trustees for specific performance of an agreement to grant them a new lease, for the only agreement which then subsisted between them was subject to the fulfilment by Brook Green of a condition which they had not performed. From this it follows that one of the basic features of the *Walsh* v. *Lonsdale* equity was wanting and Brook Green could not have relied upon the equity in any proceedings against the trustees. It is true that Brook Green may have been by September, 1957, and probably were, paying to the trustees the higher rent which was envisaged in the conditional agreement, but that fact could not convert the agreement into an unconditional one. It is also true that some months later in February, 1958, the trustees conditionally agreed to grant Brook Green the new lease even though the stipulated work had not been done; but this to our mind is nihil ad rem, for the trustees' solicitors were, on September 12, 1957, still regarding the carrying out of the scheduled work as a condition precedent to the granting of a new lease, as appears from their letter of that date to Messrs. Goodman, Derrick & Co. In our opinion the *Walsh* v. *Lonsdale* principle cannot be invoked in cases where an agreement for a lease is subject to a condition precedent which remains unperformed by the proposed tenant and has not been waived by the landlord, and this view is in accordance with the decision of Horridge J. in *Inland Revenue Commissioners* v. *Earl of Derby*,[4] which was, in our judgment, correct. Judge Blagden in the present case held that Brook Green were at all material times entitled to the benefit of the *Walsh* v. *Lonsdale* equity, and said, in dealing with the point, "Brook Green, "fearing, and with good reason, that if they went a step further "they might be caught by section 30 (2), have under advice

[3] [1955] 2 Q.B. 604; [1955] 3 W.L.R. 404; [1955] 2 All E.R. 922.

[4] [1914] 3 K.B. 1186.

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"studiously abstained from fulfilling their obligation to repair, "pursuant to the agreement under which they hold and, of "course, from executing a lease. But, in my judgment, this "comes too late, and they have already and irretrievably crossed "the Rubicon. Supposing (contrary to the fact) that they had "failed to pay rent and were sued for it in the High Court by "the Westminster trustees, Brook Green could not justify non-"payment of rent by pleading their own failure to repair. The "answer, if they tried to do so, would be: 'You can't take "'advantage of your own wrong and sit there on our land basking "'in Heaven's frown and seeking to excuse your breach of one "'of your obligations to us by pleading your breach of another "'of them. Two blacks do not make a white either in law or in "'equity, and in any case the latter deems that to be done which "'ought to have been done.' Clearly, their failure fully to per-"form their part of their agreement does not make them any the "less *Walsh* v. *Lonsdale* tenants."

Now it may well be (though it is unnecessary to decide the point) that if Brook Green had in September, 1957, refused to pay, or to continue to pay, the higher rent reserved by the conditional agreement, the trustees could have sued them for it. Their cause of action, however, if any, would, as it seems to us, have had to be founded on some implied agreement and not on the conditional agreement itself. However that may be, the judge's reasoning does not, and, as we respectfully suggest, could not, lead to the conclusion that in September, 1957, Brook Green could have sued the trustees for specific performance of the conditional agreement; and, therefore, they had no title at that time under the *Walsh* v. *Lonsdale* equity.

That being so, Brook Green are not, in our judgment, precluded by section 30 (2) of the Act in itself from relying on section 30 (1) (*g*), and the next question which arises is whether they are so precluded for any other reason. The applicant says by her cross-notice of appeal that they are, on the ground that only a "landlord" can oppose a tenant's application for a new tenancy under the Act, and that Brook Green are not a "land-"lord" within the definition of that term contained in section 44, or "the competent landlord" as defined in the Sixth Schedule to the Act.

By reason of section 24 (1) of the Act of 1954, both Brook Green's tenancy from the trustees and Mrs. Cornish's subtenancy from Brook Green continued in operation notwithstanding that, as a matter of contract, they both expired in September, 1956; and as neither tenancy was terminated subsequently in any manner authorised by the Act, the continuation of both tenancies was still effective when in September, 1957, Brook Green gave notice of their intention to oppose Mrs. Cornish's application for a new lease. In *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J.*

Graham & Sons Ltd.[5] Denning L.J. considered the position which arises from the continuation of a tenancy under the Act of 1954, and said that in his opinion the right view was that the common law tenancy subsisted with a statutory variation as to the mode of determination. In *Weinbergs Weatherproofs Ltd.* v. *Radcliffe Paper Mill Co. Ltd.*[6] Harman J. adopted the view of Denning L.J. and said that "having regard to the language used in the "Act of 1954 the term must be thought of as continuing by way "of a statutory extension." Accordingly, in the present case, the rights and obligations created by the lease of 1949 from the trustees to Brook Green were still in force (subject to the variations effected by the Act) when Mrs. Cornish's request to the trustees was rejected by them, as also were her own rights and obligations under her sublease of 1950. In these circumstances it would seem prima facie that Brook Green continued to be Mrs. Cornish's landlord and entitled as such to oppose her application for a new tenancy. Nor can we find anything in the Act to displace the prima facie view. [His Lordship read section 44 (1), and continued:]

There is nothing in that subsection which militates against the view that Brook Green continued to be Mrs. Cornish's landlord after September, 1956, for all purposes, including the purposes of Part II of the Act of 1954; and, if they were, then they were her "competent landlord" for the purposes of the Sixth Schedule to the Act if and so far as that Schedule has any relevance. It is, moreover, expressly provided by section 65 (1) of the Act that "where by virtue of any provision of this Act a "tenancy (in this subsection referred to as 'the inferior tenancy') "is continued for a period such as to extend to or beyond "the end of the term of a superior tenancy, the superior tenancy "shall, for the purposes of this Act and of any other enactment "and of any rule of law, be deemed so long as it subsists to be "an interest in reversion expectant upon the termination of the "inferior tenancy and, if there is no intermediate tenancy, to be "the interest in reversion immediately expectant upon the "termination thereof." The judge held that if (contrary to his view) Brook Green were not tenants of No. 23 under the *Walsh* v. *Lonsdale* equity, the interest to which they became entitled under the continuance provisions of the Act of 1954 constituted them Mrs. Cornish's landlords for the purposes of Part II of the Act, and we agree with him. The only argument, as we followed it, which was put forward before us on behalf of Mrs. Cornish in support of the contrary view was founded upon the definition of "tenancy" in section 69 of the Act. That definition, so far as relevant, is: "'tenancy' means a tenancy created either imme-"diately or derivatively out of the freehold, whether by a lease "or underlease, by an agreement for a lease or underlease or

[5] [1957] 1 Q.B. 159, 168; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624.

[6] [1958] Ch. 437, 446; [1958] 2 W.L.R. 1.

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"by a tenancy agreement or in pursuance of any enactment "(including this Act) . . . and references to the granting of a "tenancy and to demised property shall be construed accord-"ingly." The suggestion, as we understood it, was that in the light of this definition Brook Green's continued tenancy was not "created" by the Act of 1954, that, accordingly, they were not "tenants" of the trustees for the purposes of Part II of the Act and, therefore, were not Mrs. Cornish's "landlords" within the definition contained in section 44. Therefore, it was contended, they had no locus standi to oppose Mrs. Cornish's application under section 30. If we have followed the argument rightly, we are quite unable to accept it. If it were right, then in the innumerable cases (of which the present is an example) where subtenancies existed when the Act of 1954 came into force, Part II of the Act could have very little effective operation as between the head lessee and his under tenants. This would appear to be quite inconsistent with the general structure of the Act in this regard, and, in particular, with section 44 (1) (*b*), section 65 and the Sixth Schedule; and we are satisfied that the definition in section 69 was not intended to exclude tenancies which, if not strictly "created" by the Act, were given a statutory extension of life on the terms prescribed by the Act. In our judgment, therefore, Brook Green were by virtue of their extended tenancy from the trustees the "landlords" of Mrs. Cornish and entitled as such to oppose her application.

On the views above expressed, taken in conjunction with the judge's finding that Brook Green had established to his satisfaction the intention referred to in section 30 (1) (*g*), Mrs. Cornish's application for a new lease cannot succeed (see section 31 (1) of the Act), and the appeal must, in our judgment, be allowed. It, therefore, becomes unnecessary to consider certain other arguments which were addressed to us on the footing that the judge was right in holding that Brook Green became tenants of the trustees in 1957 by virtue of the *Walsh* v. *Lonsdale* equity. There are, however, two points which should, we think, be mentioned. The first is a suggestion which was made that Brook Green are precluded from denying the statement in their solicitors' letter of September 18, 1957, that they then held the premises, No. 23 Lower Belgrave Street, by virtue of an agreement for lease. This would amount in effect to a plea of estoppel and does not seem to have been taken before the judge. Mr. Cohen, for Mrs. Cornish, did not press it before us, rightly as we think. It is difficult to see how the applicant changed her position on the faith of the statement or was, indeed, prejudiced by it in any way. There was, at all events, no evidence to this effect, and if Mrs. Cornish had desired to establish the point, it was for her to prove it. We think, therefore, that it is not open to her to rely upon it now.

The second point is with regard to the doubt which the judge felt as to his jurisdiction to decide the question whether

Brook Green had a *Walsh* v. *Lonsdale* tenancy or not. A county court judge's jurisdiction to entertain actions to enforce specific performance of contracts for the lease of any property is limited to cases in which the value of the property does not exceed £500 (see County Courts Act, 1934, s. 52 (1) (*d*)). In *Foster* v. *Reeves*[7] this court had to consider the jurisdiction of a county court judge to entertain an action for rent against a person who was in possession of property, the value of which exceeded £500, under an executory agreement for a lease. By reason of the value of the property the county court judge had no jurisdiction to decree specific performance of the agreement, but he was of opinion that it was a case in which (under the *Walsh* v. *Lonsdale* principle) specific performance would be decreed by the High Court and that, therefore, he was bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff, the landlord, for the rent for which he was suing. This court, however, affirming the Divisional Court, held in effect that as the county court judge could not decree specific performance of the agreement, he had no jurisdiction to entertain the action for rent. In the course of his judgment Lord Esher M.R. said[8]: "If . . . we look to the common law alone this "claim cannot be supported. It is said, however, that equity "would decree specific performance, and that, if so, the case is "to be treated in every court as if specific performance had been "decreed and a lease granted. If that argument is sound, the "agreement is effective and the rent due. The answer given "to this contention is that a county court judge has no juris-"diction in such an equitable matter, and cannot take notice of "this equitable doctrine. The point is puzzling; but, on the "whole, I think the county court judge had no right in this case "to give judgment for the plaintiff. The matter could not be "brought within the equitable jurisdiction conferred on county "courts, and the judge had to deal with it at common law "only. If the debt is an equitable one, and cannot be treated "as a common law one, it could not be enforced in the county "court." The Master of the Rolls then went on to say that the judge of a county court was in the same position as a judge of a common law court before the passing of the Judicature Acts; and that if such an action as that under appeal had then been brought in a common law court, and the agreement had been put in, it could not have been enforced and the judge could have taken no notice of the equitable doctrine or entertained any inquiry as to its effect. Fry and Lopes L.JJ. delivered judgments to the same effect. We think that the note to section 52 (1) (*d*) of the Act of 1934 in the County Court Practice states sufficiently for present purposes the effect of *Foster* v. *Reeves*[9] as follows: "The effect of this decision is that where the value

[7] [1892] 2 Q.B. 255.
[8] Ibid. 257.
[9] Ibid.

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"of the premises exceeds £500 the only jurisdiction which the "judge can exercise is his common law jurisdiction. He is in "the same position as the judge of a common law court would "have been in before the Judicature Acts and consequently "cannot give effect to the equitable doctrine which was acted "on in *Walsh* v. *Lonsdale*."

In the present case the value of No. 23 Lower Belgrave Street is in excess of £500 and therefore a county court judge could not decree specific performance of an agreement to grant a lease of it. The difficulty which the judge felt in the present case was whether, having regard to the decision and judgments in *Foster* v. *Reeves*,[10] he had power to inquire whether, as the applicant alleged, a *Walsh* v. *Lonsdale* equity had been created between the trustees and Brook Green, even though he was not being asked to enforce it if he came to the conclusion that it had. In our judgment the judge was quite right in concluding that he had jurisdiction to entertain the question. By section 63 (2) of the Act of 1954 it is provided that "any jurisdiction "conferred on the court by any provision of Part II of this Act "... shall, subject to the provisions of this section, be exercised,— "(*a*) where the rateable value of the holding does not exceed "£500, by the county court; (*b*) where it exceeds £500, by the "High Court." One of the matters which necessarily arises in applications under Part II (as it arose, indeed, in the present case) is whether the relationship of landlord and tenant exists between the respective parties, and unless a county court judge has unfettered jurisdiction to determine that question, it is difficult to see how he can properly exercise the powers which are vested in him by the section. So long as the rateable value of the holding is not in excess of £500, he can, in our judgment, and must, inquire into the existence of a tenancy affecting that holding, whether such tenancy is said to have been created at law or in equity. In our opinion the judge expressed the position correctly in his judgment when he said: "I am not now asked, "as was the county court judge in *Foster* v. *Reeves*,[11] to enforce "any equitable right, whether to money, specific performance, "rectification or anything else. I am merely asked to determine "a question as to the nature of the right under which Brook "Green holds its premises, and answer that question I must if I "am to discharge my duty under section 63 (2) (*a*)." We agree with those observations of the judge.

It only remains to say in conclusion that for the reasons which we have earlier stated, this appeal should, in our judgment, be allowed.

Appeal allowed.

Solicitors: *Goodman, Derrick & Co.; Beddington, Hughes & Hobart.*

F. R. D.

[10] [1892] 2 Q.B. 255. [11] Ibid.

[HOUSE OF LORDS.]

DE DEMKO . . . . . APPELLANT;

AND

HOME SECRETARY AND OTHERS . . . . RESPONDENTS.

H. L. (E.)*

1959
Jan. 19, 22.

Court of Appeal—Jurisdiction—Criminal cause or matter—Fugitive offender—Appeal against refusal to discharge—Jurisdiction as "superior court"—Whether appellate or original—Fugitive Offenders Act, 1881 (44 *&* 45 *Vict. c.* 69), *ss.* 10, 39—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31.

An application for a writ of habeas corpus and an application for an order granting relief pursuant to section 10 of the Fugitive Offenders Act, 1881,[1] were both refused by the Divisional Court of the Queen's Bench Division, and the applicant appealed against the refusal of the order under the Act of 1881:—

Held, that as in habeas corpus proceedings the Court of Appeal had no appellate jurisdiction in cases involving a criminal cause or matter, so under the Fugitive Offenders Act, 1881, it had no such jurisdiction; the jurisdiction conferred by sections 10 and 39 of the Act of 1881 was original and not appellate and, accordingly, the court could not entertain the appeal.

Rex v. *Governor of Brixton Prison, Ex parte Savarkar* [1910] 2 K.B. 1056; 26 T.L.R. 561 (followed in *In re Henderson* [1950] 1 All E.R. 283) approved.

Decision of the Court of Appeal, sub nom. *Reg.* v. *Governor of Brixton Prison, Ex parte de Demko* [1958] 3 W.L.R. 624; [1958] 3 All E.R. 360 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Sellers and Pearce L.JJ.).

This was an appeal from an order and decision of the Court of Appeal dated October 7, 1958, whereby it was held that the court had no jurisdiction to entertain an appeal from an order of the Divisional Court of the Queen's Bench Division of the High Court of Justice refusing relief under section 10 of the Fugitive Offenders Act, 1881, to the appellant Baron Kalman de Demko. The

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* *Present*: LORD REID, LORD GODDARD, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD BIRKETT.

[1] Fugitive Offenders Act, 1881, s. 10: "Where it is made to appear "to a superior court that by reason "of the trivial nature of the case, or "by reason of the application for the "return of a fugitive not being made "in good faith in the interests of "justice or otherwise, it would, "having regard to the distance, to "the facilities for communication, and "to all the circumstances of the case, "be unjust or oppressive or too severe "a punishment to return the fugitive "either at all or until the expiration "of a certain period, such court may "discharge the fugitive, either absolutely or on bail, or order that he "shall not be returned until after the "expiration of the period named in "the order, or may make such other "order in the premises as to the court "seems just."

S. 39: "The expression 'superior "'court' means: (1) In England, "Her Majesty's Court of Appeal and "High Court of Justice; and (2) In "Scotland, the High Court of Justiciary . . ."

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decision of the Court of Appeal was given on a preliminary objection taken by the Solicitor-General on behalf of the two first-named respondents, the Home Secretary and the Governor of Brixton Gaol. The appellant's appeal to the Court of Appeal on the merits was never heard. The present appeal was confined to the issues raised by the preliminary objection.

The appellant was arrested on February 19, 1958, on various charges of fraud and theft alleged to have been committed in the Union of South Africa in or before June, 1951. He was brought before the Chief Magistrate for the Metropolis (Sir Laurence Dunne) sitting at the Bow Street Magistrates' Court, where the third respondent, the High Commissioner of the Union of South Africa, elected to proceed on three out of eighteen charges originally preferred against him and the magistrate, in accordance with the provisions of section 5 of the Fugitive Offenders Act, 1881, found one of these three charges to give strong and probable cause to believe in the appellant's guilt.

F. H. Lawton Q.C. and *P. A. W. Merriton* for the appellant.

Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn and *E. J. P. Cussen* for the first two respondents.

J. C. Phipps for the third respondent.

Besides the authorities referred to in Lord Reid's opinion, *In re Carroll* [2] and *National Telephone Co. Ltd.* v. *Postmaster-General* [3] were cited in argument.

Their Lordships took time for consideration.

January 22. Lord Reid. My Lords, the appellant was arrested on February 19, 1958, on charges of fraud and theft alleged to have been committed in the Union of South Africa in or before 1951. He was brought before the Chief Magistrate at Bow Street "as provided by the Fugitive Offenders Act, 1881, to show "cause why he should not be returned to the said Dominion in "manner provided by the said Act, on the ground of his being "accused of the commission of the following offence within the "jurisdiction of the said Dominion" (I quote from the order of the Chief Magistrate). The offence was described as "Theft: Con-"verting to his own use a loan of £6,500 from" a certain Mrs. Smith. The order made was that the appellant should be kept in custody until delivered pursuant to the provisions of the Fugitive Offenders Act.

The appellant made an application under section 10 of that Act and also an application for leave to issue a writ of habeas corpus. These applications were heard by a Divisional Court on July 14, 1958. [His Lordship read section 10 and continued:]

[2] [1931] 1 K.B. 104; 47 T.L.R. 20.

[3] [1913] A.C. 546; 29 T.L.R. 636.

Devlin J. said, in delivering the judgment of the court: "The "matter has therefore been argued before us on the basis that it "would be unjust or oppressive for us to order him to return to "stand his trial, and the point has been made that these events "and this particular charge occurred seven years ago, and that "the lapse of time would make it unjust or oppressive that he "should now have to go to South Africa to stand his trial. We "have heard argument on that on both sides. We have given "consideration to the matters which have been raised, and we are "not satisfied on the whole that it would be unjust or oppressive "to require the accused to stand his trial now on this matter." The application for a writ of habeas corpus was also refused.

The appellant then appealed to the Court of Appeal and the present respondent took the preliminary objection that the Court of Appeal had no jurisdiction to hear the appeal. The appellant did not maintain that he was entitled to appeal against the refusal to issue a writ of habeas corpus, recognising that *Amand* v. *Home Secretary*[1] was conclusive authority against the competency of such an application, but he maintained that he was entitled to appeal to the Court of Appeal against the dismissal of his application under section 10 of the Fugitive Offenders Act. The Court of Appeal on October 6, 1958, upheld the respondents' objection to the competency of that appeal, dismissed the appeal with costs, and granted leave to appeal to this House.

Section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides: "(1) No appeal shall lie (*a*) except as pro-"vided by the Criminal Appeal Act, 1907, or this Act, from any "judgment of the High Court in any criminal cause or matter." If there was any jurisdiction in the Court of Appeal with regard to applications under section 10, it would seem to be saved by section 26 (2) (*d*) of the 1925 Act. I must therefore look at the earlier position.

There was a similar provision in section 47 of the Supreme Court of Judicature Act, 1873: ". . . no appeal shall lie from any "judgment of the said High Court in any criminal cause or "matter, save for some error of law apparent upon the "record . . ." The matter of error of law apparent upon the record does not now arise.

It is rightly admitted that the appellant's application to the Divisional Court was a criminal cause or matter and therefore the appeal to the Court of Appeal could only be competent if there is some statutory provision which excepts applications under section 10 from the general rule which denies jurisdiction to the Court of Appeal in any appeal relating to a criminal cause or matter.

The appellant argues that such a statutory provision is to be found in the Fugitive Offenders Act. Section 10 refers to a superior court, and the expression "superior court" is defined

[1] [1943] A.C. 147; 58 T.L.R. 382; [1942] 2 All E.R. 381.

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in section 39 as meaning: "(1) In England, Her Majesty's Court "of Appeal and High Court of Justice; and (2) In Scotland, the "High Court of Justiciary; and (3) In Ireland, Her Majesty's "Court of Appeal and Her Majesty's High Court of Justice at "Dublin; and (4) In a British possession, any court having in "that possession the like criminal jurisdiction to that which is "vested in the High Court of Justice in England, or such court "or judge as may be determined by any Act or ordinance of that "possession."

No one has yet been able to suggest even a plausible reason why the definition of "superior court" in section 39 should contain any reference to the Court of Appeal. The Court of Appeal was established by the Supreme Court of Judicature Act, 1873, and its jurisdiction arises entirely from statute. Its function is to exercise appellate jurisdiction in civil cases. It is true that there are one or two matters of comparatively small importance in which it has been given original jurisdiction, and there is at least one matter, criminal in form, in which it has been given appellate jurisdiction because that matter is civil in substance (section 27 of the Act of 1925). But there appears to be no matter at all comparable to the present in which it has any jurisdiction at all. Applications under section 10 are often combined with applications for leave to issue a writ of habeas corpus, and it is common ground that the Court of Appeal has no jurisdiction either original or appellate to deal with habeas corpus applications. But some meaning must be found for the reference to the Court of Appeal in section 39; it must be held to confer on that court jurisdiction of some kind, original or appellate, to deal with applications under section 10. To hold that the Court of Appeal is given original jurisdiction co-ordinate with that of the High Court does not create any great difficulty. It merely produces the somewhat odd result that an applicant under section 10 can choose whether to make his application to a Divisional Court or to the Court of Appeal. But to hold that this reference to the Court of Appeal confers an appellate jurisdiction would create much more difficulty. In the first place, it would entail a breach of the general rule clearly laid down in the Supreme Court of Judicature Act that the Court of Appeal has no appellate jurisdiction in a criminal cause or matter, and if it was intended that the Court of Appeal should have that jurisdiction, one would have expected the intention to be much more clearly stated. Secondly, it would mean that considerable delays would be made possible in a matter which otherwise could and should be speedily disposed of. And thirdly, it would mean that there would be a marked difference between the law in England and Ireland on the one hand, and the law in Scotland on the other, because it is quite clear that in Scotland there can be no appeal from the first order of the superior court there. Apart from authority, I would, therefore, say without hesitation that this reference to the Court

of Appeal in section 39 of the Fugitive Offenders Act, 1881, must be held to confer on that court original, but not appellate, jurisdiction.

When I turn to authority I find that this view is confirmed in *Rex* v. *Governor of Brixton Prison, Ex parte Savarkar.*[2] The applicant made application to the High Court for a writ of habeas corpus and he also founded on section 10 of the Fugitive Offenders Act. Although the court decided against him on both these matters, the order of the court only referred to the habeas corpus application. The Court of Appeal held that they had no jurisdiction to deal with the habeas corpus application, that the matter of section 10 not being mentioned in the order was not properly before them in the appeal, but that they had original jurisdiction to deal with an application under section 10, and that this matter was not res judicata because it was not dealt with in the lower court's order. An application was therefore made to the Court of Appeal under section 10. A preliminary objection to its competency was not upheld and the application was heard and dismissed.

Counsel for the appellant argued that *Savarkar's* case[2] was wrongly decided and he founded on a passage in the judgment of Buckley L.J.[3]: "There is one other point upon which I wish "to say a word. It is this: it would be another possible objection "to the original motion which, as the result of this judgment, we "are going to hear that, where the Act of 1881 refers to the "'Court of Appeal' as a 'superior court,' it means that court "sitting as a court of appeal. The learned Solicitor-General has "not thought fit to argue that point. I agree with what "Vaughan Williams L.J. has said to the effect that we must for "ourselves determine that point in order to hear this motion. "As my two brothers think that that point is to be resolved in "favour of our hearing the motion, of course that decides the "matter. For my own part, I have not heard the matter argued, "and will only say that I think it a question of very considerable "difficulty whether, when this Act speaks of the 'Court of "'Appeal,' it does not mean the Court of Appeal sitting as a "court of appeal. It is unnecessary for me to say more as to "this point, because the other members of the court do not think "that is the meaning." I do not think that it is necessary to make further citations from this case. For my part, I can only say that I think that the case was rightly decided, and in subsequent cases it has been accepted without question. In *In re Henderson*[4] an application under section 10 to the Court of Appeal was dealt with, without any question being raised as to the competency, and in *Amand's* case[5] reference was made to *Savarkar's* case[6] by both Lord Simon and Lord Wright. It is

[2] [1910] 2 K.B. 1056; 26 T.L.R. 561.
[3] [1910] 2 K.B. 1056, 1079.
[4] [1950] 1 All E.R. 283.
[5] [1943] A.C. 147.
[6] [1910] 2 K.B. 1056.

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Lord Reid.

true that *Amand's* case [7] does not raise the precise point here, but it is obvious that *Savarkar's* case [8] was considered with some care. Lord Simon said [9]: "As regards the right to appeal, it has "been consistently held that there is no right of appeal from the "refusal of the writ in extradition proceedings (*Ex parte Wood-"hall* [10]) or in proceedings under the Fugitive Offenders Act, 1881 "(*Rex* v. *Governor of Brixton Prison, Ex parte Savarkar* [11]). It "will be observed that these two decisions, which I accept as "correct, involve the view that the matter in respect of which the "accused is in custody may be 'criminal' although he is not "charged with a breach of our own criminal law." Lord Wright twice referred to *Ex parte Savarkar* [11] without any indication of doubt on his part that the case had been well decided. I am, therefore, of opinion that the Court of Appeal reached a correct result in this case, and I move your Lordships to dismiss this appeal with costs.

LORD GODDARD. My Lords, I concur.

LORD TUCKER. My Lords, I agree.

LORD KEITH OF AVONHOLM. My Lords, I agree.

LORD BIRKETT. My Lords, I agree.

Appeal dismissed.

Solicitors: *Beach & Beach; Director of Public Prosecutions; Jaques & Co.*

F. C.

[7] [1943] A.C. 147.
[8] [1910] 2 K.B. 1056.
[9] [1943] A.C. 147, 156.
[10] (1888) 20 Q.B.D. 832; 4 T.L.R. 515.
[11] [1910] 2 K.B. 1056.

[PROBATE, ETC., DIVISION.]

CLAXTON v. CLAXTON.

1959
Jan. 19.
Lord Merriman P. and Stevenson J.

Husband and Wife—Justices—Rehearing ordered on appeal—Whether court rehearing case should read judgments of Divisional Court—Principles to be followed.

A wife applied to a court of summary jurisdiction for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but her complaint was dismissed. Her appeal to the Divisional Court was allowed and a rehearing was ordered. The question arose at the rehearing whether the justices should have before them a transcript of the judgments delivered when the appeal was allowed. On the question being referred to the Divisional Court for directions:—

Held, (1) that when justices are ordered to rehear a case because of a mistake of law, the transcript of the judgments of the

Divisional Court should be considered by them so that they may avoid a repetition of that mistake.

(2) That when the rehearing is ordered because the Divisional Court have differed from the justices as to the inferences of fact to be drawn from the evidence, the justices who rehear the case ought to reach their own conclusions of fact upon the evidence then placed before them, without reference to what the Divisional Court had said as to the inferences to be drawn from the evidence given at the previous hearing.

(3) That, if in the course of the rehearing any reference should be made to any supposed point on which the Divisional Court was alleged to have expressed an opinion, or if any attempt should be made to introduce any part of the reasoning of the justices who first heard the case upon a question of fact, then the whole matter would be open and the justices would not only be entitled, but would be bound, to let in the judgments of the Divisional Court.

APPLICATION for the directions of the Divisional Court in connection with the rehearing by the Kingston-upon-Hull justices of a wife's application for maintenance.

On April 18, 1957, the stipendiary magistrate for Kingston-upon-Hull dismissed a wife's complaint that her husband had deserted her and that he had wilfully neglected to provide reasonable maintenance for her. The husband did not give evidence. The wife appealed; and on October 17, 1958, the Divisional Court allowed her appeal and ordered a rehearing of her complaint by a panel of justices.

On December 29, 1958, at the rehearing before the Kingston-upon-Hull justices, counsel opening the wife's case proposed to read a transcript of the judgments of the Divisional Court which had been delivered at the hearing of the wife's appeal. The justices refused to allow this transcript to be read, and the case was adjourned so that the directions of the Divisional Court on this point could be obtained.

Mrs. E. K. Lane for the wife.
J. S. Taylor for the husband.

Reference was made in argument to *Marjoram* v. *Marjoram* [1] and the direction in *Harvey* v. *Harvey*.[2]

Counsel for the husband was not called upon.

LORD MERRIMAN P. This is a wife's application for directions in connection with a rehearing before a bench of justices for the Kingston-upon-Hull petty sessional division of a complaint by

[1] [1955] 1 W.L.R. 520; [1955] 2 All E.R. 1.

[2] [1955] 1 W.L.R. 975 (sub nom. *Practice Direction*); [1955] 3 All E.R. 82. The Practice Direction was as follows:

LORD MERRIMAN P. I am now in a position with the consent of the Lord Chancellor to make the following announcement: The Treasury have agreed that transcripts of the judgments of the Divisional Court may be provided at the public expense in all cases in which the Divisional Court directs a rehearing by magistrates, and in any other cases which the court considers fit for a transcript.

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Lord Merriman P.

the wife which was the subject of an appeal to this court in June and October, 1958.

Put quite shortly, it was a case in which the stipendiary magistrate for that city had dismissed the wife's complaints of desertion and wilful neglect to maintain. The real fight was on the subject of desertion; whether, as the wife complained, she had or had not been expelled from the matrimonial home by conduct which, putting it in the shortest possible way, was said to be ill-treatment by her mother-in-law, condoned or acquiesced in without any protection afforded to her by the husband. The stipendiary magistrate came to the conclusion that the wife had not made out her complaint, and we had a very full trial before this court which included, amongst other things, an attempt to bring about a reconciliation, which was abortive.

Looking back at my notes I see that we had before us a transcript of the evidence before the stipendiary magistrate which ran to some 70 pages of foolscap, and we had a certain amount of correspondence. Of one thing only we had no transcript, or copy, and that was the evidence of the husband, because he was not called to give evidence, in spite of figuring, as I have said, as the passive encourager, so it was suggested, of the treatment meted out to the wife by his mother.

The magistrate had taken a view of the case based on his interpretation of the evidence, which was set out at considerable length, in a very careful judgment; we took a different view, and, indeed, in certain respects on particular points we differed explicitly from the view taken by the stipendiary magistrate as to the effect of the evidence. But from first to last the question was purely one of the true inferences to be drawn upon the facts as we saw them, of course, only at secondhand, from a very full note and after hearing very full argument.

We decided that the case called for a rehearing, and it was made abundantly clear, in unmistakable language, by my brother who delivered the first judgment, with which, as I said, I wholeheartedly agreed, that the observations we had made in support of our view that different inferences of fact should be drawn from those which had been drawn by the stipendiary magistrate were not intended in any way to prejudice the rehearing by a fresh panel, who would come to their own conclusion.

When the case came on it was attempted in the opening on behalf of the wife to read our judgment, and the justices expressed the view that they wished, or thought they ought, to have an unprejudiced view of the evidence, without the matter being in any way hampered, or assisted, as the case may be, by anything which we had said on the interpretation of the transcript.

We are asked to say that this creates a dangerous precedent, and that it is of vital importance that a public judgment, as a judgment of this court is, should not be concealed artificially from the justices when the matter comes on for rehearing. Now, I think for my part that this is not a matter about which a

general pronouncement can be made. I think everything depends upon the nature of the particular case. In the first place, I draw the widest possible distinction between a judgment of this court which points out that the justices have gone wrong in this or that particular as a matter of law, and a judgment in a case which depends solely upon inferences on fact. In cases involving matters of law—and they, of course, form the very great majority of the cases in which we do order a rehearing—there can, I think, be no question but that the justices must have the right—indeed, the duty—to see in what respect we think that the first court misdirected themselves in matters of law, so that they may avoid falling into the same pitfall; of that I think there can be no doubt at all. But when a case is purely one of the inferences of fact which are to be drawn from this piece of evidence or that piece of evidence, and the whole thing is simply one of fact, in my opinion the position is different, and I think we should be making nonsense, making a pretence, indeed, of saying, as we did say in this case, and as we habitually say in other cases, that with regard to the inferences of fact we have no wish at all to prejudice the rehearing but are only trying to show sufficient grounds for having ordered a rehearing: we should, I think, be making a pretence of that, and turning it into a mere formula, if we were to force magistrates who wish to form their own view to read what we did in fact say about the various questions of fact.

Now to be a little more particular about this case. It is said that to take this view of the matter puts an impossible burden upon the court, upon counsel and upon advocates generally, because it is impossible to know where the line should be drawn. Well, it is a very long time since it was first said—and the instance I have in mind is one in which it was said by Lord Blackburn—that it may be very difficult to know where to draw the line, but it may be very easy to say of any given case that it is on one side or the other of any line that can reasonably be drawn. I say no more about this case than that it is perfectly easy to say that it stands unquestionably on the side which is one of pure fact and no law, rather than on the side where there is some law but a good deal of fact, and a very, very, long way indeed from a case where the decision to upset the judgment in the first trial depended solely upon a matter or matters of law alone.

I think that the justices were right in taking the view that they would try the case better if they did not have our judgment read. We have read it very carefully and had it read to us, and I think they were right in that view, but I want to say this by way of caution: if in the course of the hearing any reference is made to any supposed point on which we are alleged to have expressed an opinion, or if any attempt is made to introduce any part of the very full and careful reasoning of the stipendiary magistrate about a question of fact, then in my view the whole thing would be open, and the justices would not only be entitled

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but would be bound to let in what we said about the case. But provided the case is tried as it should be, de novo and without reference to inferences which may have been drawn in the past, either by the stipendiary magistrate or by this court on the questions of fact, I think that this judgment should remain where it is. The secret is, I imagine, only known to the clerk of the court, who will be able to ensure that there is fair play all round.

STEVENSON J. I entirely agree, and I only want to add a few words by way of emphasis, lest anyone may in future seek to suggest as a general proposition that judgments of this court should not be revealed to justices who are charged with the task of rehearing a case remitted by this court.

The question at issue in this case is whether or not this husband constructively deserted this wife. In the course of the hearing before the stipendiary magistrate at Hull the husband was not called. The evidence of the husband was in our view essential to the determination of the question which that court had to decide, and it is important to observe that counsel for the husband appearing in this court conceded that there must be a rehearing.

In those circumstances the judgments delivered in this court consist almost entirely of discussion of and comment upon, the evidence before the stipendiary magistrate, which are designed to explain or justify the order for the rehearing, which was already a matter of concession.

I have said that in order to emphasise that these judgments consist of comments upon facts, and nothing else.

Now it is the task of the justices who form the panel engaged in rehearing this case to try those very facts, one hopes upon evidence which will be complete, and upon which they will have a full opportunity of making up their own minds.

In those circumstances I think that they were manifestly right not to consider and permit to be read before them the judgments of this court, which are, indeed, qualified by the observation that they are not intended to prejudice the retrial of the issues in this case by the fresh panel of justices.

As my Lord has pointed out, utterly different considerations must arise where a judgment is based on any proposition of law, or any direction upon a matter of law in relation to which the court of trial has gone wrong, because, of course, the justices who have to rehear such a case must always direct themselves with reference to the judgments which have been delivered in this court.

For these reasons I am quite satisfied that this application must be dismissed.

Direction accordingly

Solicitors: *Kingsford, Dorman & Co. for Gosschalk, Austin & Wheldon, Hull; Thompson, Cook & Babington, Hull.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

FOWLER v. LANNING.

1958
Dec. 18, 19.

1959
Jan. 19.

Diplock J.

Practice—Pleading—Trespass—Whether plaintiff must plead negligence. Burden of Proof—Trespass to the person—Negligence—Proof of. Trespass—Trespass to the person—Unintentional act—Shooting accident—Whether action will lie without proof of negligence—Whether distinction between injury on highway and elsewhere.

In an action based on trespass to the person the plaintiff's statement of claim alleged simply that on a certain date and at a certain place "the defendant shot the plaintiff," and that by reason thereof the plaintiff sustained personal injuries, particulars of which were given. The defendant by his defence traversed the allegations of fact and objected that the statement of claim disclosed no cause of action on the ground that the plaintiff did not allege that the shooting was intentional or negligent:—

Held, (1) that trespass to the person did not lie if the injury to the plaintiff was caused unintentionally and without negligence on the defendant's part, and this applied whether the injury was caused on the highway or in any other place.

(2) That, if negligence was a necessary ingredient of unintentional trespass only where the circumstances showed that the plaintiff had taken upon himself the risk of inevitable injury, the plaintiff today must be considered as taking upon himself such a risk arising from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful.

(3) That the onus of proving negligence, where the trespass was not intentional, lay upon the plaintiff, who should plead and give particulars of negligence; accordingly, having failed to do so, the plaintiff's statement of claim disclosed no cause of action.

Dictum of Blackburn J. in *Fletcher* v. *Rylands* (1866) L.R. 1 Ex. 265, 286; *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261 and *Stanley* v. *Powell* [1891] 1 Q.B. 86 applied.

Weaver v. *Ward* (1617) Hob. 134; *Hall* v. *Fearnley* (1842) 3 Q.B. 919; 12 L.J.Q.B. 22; *Wakeman* v. *Robinson* (1823) 1 Bing. 213; *River Wear Commissioners* v. *Adamson* (1876) 2 App.Cas. 743 considered.

Quaere, whether, if a statement of claim discloses facts which invoke the doctrine res ipsa loquitur, it is necessary for negligence to be pleaded in terms.

PRELIMINARY POINT OF LAW under R.S.C., Ord. 25, r. 2.

On March 26, 1958, the plaintiff, Thomas Winston Fowler, issued a writ claiming damages from the defendant, William George Lanning, for trespass to the person. By his statement of claim, delivered on March 29, 1958, the plaintiff alleged that "on November 19, 1957 at Vinyard Farm, Corfe Castle, in the "county of Dorset the defendant shot the plaintiff. By reason "of the premises the plaintiff sustained personal injuries," particulars of which were given. On May 9, 1958, the defendant delivered a defence traversing the plaintiff's allegations of fact and objecting "that the statement of claim is bad in law and "discloses no cause of action against him on the ground that

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"the plaintiff does not allege that the said shooting was either "intentional or negligent." On July 31, 1958, the Bournemouth District Registrar ordered that the point of law raised by the defendant's objection be tried as a preliminary point of law under the provisions of R.S.C., Ord. 25, r. 2, and the plaintiff's appeal against this order was dismissed by Pearson J. in chambers on October 2, 1958.

Ingram Poole for the applicant (defendant).
H. E. Lewis McCreery for the respondent (plaintiff).

The following cases were referred to in argument in addition to those cited in the judgment: *Esso Petroleum Co.* v. *Southport Corporation* *; *Underwood* v. *Hewson* †; *Winnipeg Electric Co.* v. *Geel* ‡; *Bolton* v. *Stone* §; *The Albano* ||; *Manton* v. *Brocklebank* ¶; *Morriss* v. *Marsden* **; *Dumbell* v. *Roberts* ††; *Milman* v. *Dolwell* ‡‡; *Brown* v. *Kendall.* §§

Cur. adv. vult.

January 19. DIPLOCK J. read the following judgment.

"The distinction between actions of trespass on the case "and trespass vi et armis should be most carefully and precisely "observed. Otherwise we shall introduce much confusion "and uncertainty." So said de Grey C.J. in 1773 in *Scott* v. *Shepherd.*[1] It must gratify the ghosts of generations of special pleaders that today, nearly a century after the passing of the Judicature Act, 1875, I should be invited to decide whether such a distinction still exists where an unintentional injury to the person of the plaintiff arises directly from an act of the defendant, and should be invited to decide this point upon what is the modern equivalent of demurrer.

The writ in this case claims damages for trespass to the person committed by the defendant at Corfe Castle, in the county of Dorset, on November 19, 1957. The statement of claim alleges laconically that at that place and on that date "the defendant "shot the plaintiff," and that by reason thereof the plaintiff sustained personal injuries and has suffered loss and damage. By his defence the defendant, in addition to traversing the allegations of fact, raises the objection "that the statement of claim is bad "in law and discloses no cause of action against him on the ground "that the plaintiff does not allege that the said shooting was "either intentional or negligent."

* [1956] A.C. 218; [1956] 2 W.L.R. 81, H.L.; [1954] 2 Q.B. 182; [1954] 3 W.L.R. 200, C.A.; [1953] 3 W.L.R. 773, Devlin J.
† (1724) 1 Strange 596.
‡ [1932] A.C. 690.
§ [1951] A.C. 850; [1951] 1 T.L.R. 977.
|| [1892] P. 419.
¶ [1923] 2 K.B. 212; [1923] 39 T.L.R. 344.
** [1952] W.N. 188; [1952] 1 T.L.R. 947.
†† (1944) 60 T.L.R. 231; [1944] 1 All E.R. 362.
‡‡ (1810) 2 Camp. 378.
§§ (1850) 6 Cush. 292 (U.S.A.).
[1] (1773) 3 Wils.K.B. 403.

An order has been made that this point of law be disposed of before the trial of the issues of fact in the action. That order is binding upon me, and, in disposing of it, I can look no further than the pleadings. I must confess that at first glance at the pleadings I felt some anxiety lest I was being invited to decide a point which has long puzzled the professors (see the article by Professors Goodhart and Winfield, 1933 Law Quarterly Review, vol. 49, p. 359; Pollock on Torts, 15th ed., p. 128; Salmond on Torts, 12th ed., p. 311; Winfield on Torts, 5th ed., p. 213), only to learn ultimately that, just as in *Donoghue* v. *Stevenson*,[2] there was in fact no mouse in the ginger beer bottle, so in this case there was in fact no pellet in the defendant's gun.

The point of law is not, however, a mere academic one even at the present stage of the action. The alleged injuries were, I am told, sustained at a shooting party; it is not suggested that the shooting was intentional. The practical issue is whether, if the plaintiff was in fact injured by a shot from a gun fired by the defendant, the onus lies upon the plaintiff to prove that the defendant was negligent, in which case, under the modern system of pleading, he must so plead and give particulars of negligence (see R.S.C., Ord. 19, r. 4), or whether it lies upon the defendant to prove that the plaintiff's injuries were not caused by the defendant's negligence, in which case the plaintiff's statement of claim is sufficient and discloses a cause of action (see R.S.C., Ord. 19, r. 25). The issue is thus a neat one of onus of proof.

I am much indebted to counsel on both sides for their diligence and erudition in tracing the history of the distinction between trespass vi et armis and trespass on the case before the passing of the Judicature Acts, 1873 and 1875. I do not think it necessary, however, to examine in detail the earlier controversies alluded to by Lord Ellenborough in *Covell* v. *Laming*[3] as to whether trespass lay at all when the injury was unintentional, even although it was direct. That it did must be regarded as settled in 1803 by *Leame* v. *Bray*,[4] which decided that trespass vi et armis could lie wherever the personal injury complained of arose directly from the act of the defendant himself. The converse proposition that trespass on the case did not lie where the injury was direct, even although it was unintentional, which at first sight appeared to be established in 1794 by *Day* v. *Edwards*,[5] had been swept away at least by 1833 when the Court of Common Pleas in *Williams* v. *Holland*,[6] distinguishing—if not riding rough-shod over—*Day* v. *Edwards*,[7] held that an action on the case was an available remedy in such a state of facts. Pausing, therefore, at the convenient date of 1852, when the Common Law Procedure Act was passed, it was well established that where personal injury was caused to the plaintiff by

[2] [1932] A.C. 562; 48 T.L.R. 494.
[3] (1808) 1 Camp. 497.
[4] (1803) 3 East 593.
[5] (1794) 5 Term Rep. 648.
[6] (1833) 10 Bing. 112.
[7] (1794) 5 Term Rep. 648.

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Diplock J.

the direct act of the defendant himself, alternative remedies in trespass to the person and in negligence were available.

What by that date was the essential difference between the two alternative remedies based on identical facts? It is fashionable today to regard trespass to the person as representing the historic principle that every man acts at his peril and is liable for all the consequences of his acts; negligence as representing the more modern view that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others: see *per* Lord Macmillan in *Read* v. *J. Lyons & Co.*[8] But however true this may have been of trespass in medieval times—and I respectfully doubt whether it ever was—the strict principle that every man acts at his peril was not applied in the case of trespass to the person even as long ago as 1617. It is true that in that year, in the much-cited case of *Weaver* v. *Ward*,[9] which arose out of a shooting accident during an exercise of trained bands, the Court of King's Bench held that a plea that "the defendant casualiter et per infortuniam et contra volun-"tatem suam, in discharging of his piece did hurt and wound "the plaintiff" was demurrable. But it would seem that this was because the plea, which was a special plea, was insufficient because, although it denied intention, it did not negative negligence on the part of the defendant. It is clear from the report that the court was of opinion that the action of trespass to the person would fail if it should appear that the accident was "inevitable and that the defendant had committed no negligence "to give occasion to the hurt."

This phrase is repeated in many of the later cases. Where it appears, however, it must be read in its historical context and not as if it were being used by judges to whom modern concepts of negligence, contributory negligence, and causation were familiar. An examination of the cases up to 1842 in which this or some similar phrase was adopted shows, I think, that the word "inevitable" was superfluous, and that the phrase meant no more than that the accident could not have been avoided by the exercise of reasonable care on the part of the defendant. In the difficult case of *Hall* v. *Fearnley*[10] in 1842, reported in very different terms in the Queen's Bench Reports, and in the Law Journal Reports, Lord Denman C.J. and Wightman J. appear to have regarded "inevitable" as something different from absence of negligence on the part of the defendant, but did not suggest that such absence of negligence was not in itself a defence. In any event, I can find no trace in the cases from the seventeenth century onwards that a defendant, in order to escape liability for unintentional trespass to the person, must comply with any higher standard of care than was needed to escape liability if the action were framed in trespass on the case. So,

[8] [1947] A.C. 156, 170; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[9] (1617) Hob. 134.

[10] (1842) 3 Q.B. 919; 12 L.J.Q.B. 22.

too, it appears to have been taken for granted by the beginning of the nineteenth century that contributory negligence—although not under that name, which is of more recent origin—disentitled the plaintiff to recover whether the action were framed in case, as in *Butterfield* v. *Forrester*,[11] or in trespass to the person, as in *Knapp* v. *Salisbury*.[12]

Apart from the question of onus of proof, which I must now examine, there does not appear by 1852 to have been any difference between the substantive law applicable whether the action were framed in trespass on the case or trespass to the person. Differences as regards pleading were, of course, in those days, vital, but are not relevant for the purposes of the present case in 1959, except in so far as they throw any light upon where the onus of proof lay.

In trespass on the case the onus of proof of the defendant's negligence undoubtedly lay upon the plaintiff. Where it lay in trespass is much more difficult to determine. The defence that the accident "was inevitable and that the defendant had com-"mitted no negligence to give occasion to the hurt" was available to the defendant upon a plea to the general issue by the end of the seventeenth century: see *Gibbons* v. *Pepper*[13]; and this appears to have been accepted by the Court of Common Pleas as late as 1823: see *Wakeman* v. *Robinson*[14]—a case still cited as authority in the third edition of Bullen & Leake in 1868. Since the plea to the general issue merely denied the existence of the necessary ingredients of the tort, this would suggest that in the case of trespass to the person the onus lay upon the plaintiff to show that the defendant's act was either intentional or negligent. Lord Ellenborough, on the other hand, sitting at nisi prius in 1810, had aready decided in *Knapp* v. *Salisbury*[15] that such a defence must be specially pleaded, and the Court of King's Bench in 1842 in *Hall* v. *Fearnley*[16] appears to have come down on the pleading point on the side of Lord Ellenborough, although the differences between the two reports of this case make it difficult to elicit the ratio decidendi. But although the two last-cited cases destroy the force of any inference as to onus of proof which might be drawn from *Gibbons* v. *Pepper*,[17] they do not themselves give rise to the contrary inference. With the growth of special pleading, and in particular after the "general "rules" of 1840, there were many matters the onus of proof of which, if disputed, lay upon the plaintiff, which were not regarded as traversed by a plea to the general issue: see Bullen & Leake, 3rd ed., pp. 699–704.

I do not find the pre-Common Law Procedure Act, 1852, cases conclusive or, indeed, helpful as to where the onus of proof of the defendant's negligence or absence of negligence lay where the

[11] (1809) 11 East 60.
[12] (1810) 2 Camp. 500.
[13] (1694) 1 Lord Raym. 38.
[14] (1823) 1 Bing. 213.
[15] (1810) 2 Camp. 500.
[16] (1842) 3 Q.B. 919; 12 L.J.Q.B. 22.
[17] (1694) 1 Lord Raym. 38.

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action was founded upon trespass to the person and not on trespass on the case. The reported cases turn upon points of pleading, a science upon which the legal mind was then wonderfully concentrated, and when, in any particular case, that science had achieved its object in arriving at an issue of fact for the jury in an action of trespass to the person, it could only be very rarely that the question of onus of proof was crucial. Since trespass to the person only lay where the injury to the plaintiff was the direct consequence of the personal act of the defendant, proof that the defendant did the act and that the plaintiff was thereby injured would normally be prima facie evidence of the defendant's negligence sufficient also to sustain an action on the case in accordance with the common-sense view applied at nisi prius long before Pollock C.B. in *Byrne* v. *Boadle* [18] translated it into Latin as res ipsa loquitur. At the time the case came before the jury, therefore, there can have been little practical difference between trespass and case, even if in the former the onus of negativing negligence did lie upon the defendant, while in the latter the onus of proving negligence lay upon the plaintiff. But whatever the reason, I can find no trace in the reports that the possibility that the onus of proof might be different in the two classes of cases was a question which ever occurred to the judges of those days, or that their charge to the jury differed according to whether the action were framed in trespass or in case.

The majority of pre-Common Law Procedure Act cases in which the question of unintentional trespass to the person or to goods was discussed were, it is true, cases of collision on the highway either on land or on water. There is, however, no suggestion that I can find in any of the judgments that this was a relevant consideration, or that the law as to trespass vi et armis to the person or to goods was different according to whether the injury took place on a highway or not. Prima facie, therefore, one would suppose that the onus of proof lay upon the same party to the action in either case. If, then, it is conceded—as all agree that it must be at any rate today—that in the case of an involuntary trespass to the person on a highway the onus of proving negligence lies on the plaintiff; why should it be otherwise when the involuntary trespass to the person is not committed on a highway? There is, nevertheless, a formidable body of academic opinion—but not, I think, any binding judicial authority—that highway cases have in the last 100 years become an exception to a previously existing general rule that the onus of proof of absence of negligence on the part of a defendant in a case founded on trespass to the person lies upon the defendant himself.

As I have already said, I do not think that the cases prior to the Common Law Procedure Act, 1852, establish that there ever was such a general rule, nor do I think that the subsequent

[18] (1863) 2 H. & C. 722.

cases, on analysis, suggest that those judges who were familiar with the procedure before 1852 took the view that there ever had been such a rule. The dictum of Blackburn J. in *Fletcher* v. *Rylands* [19] is generally regarded as the origin of some modern rule special to highways. But what he said in a case which, after all, was about the flooding of coal mines, was not limited to accidents on highways or to trespass to the person.[20] "Traffic "on highways, whether by land or sea, cannot be conducted with-"out exposing those whose persons or property are near it to "some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be "held to do so subject to their taking upon themselves the "risk of injury from that inevitable danger." So far he is dealing with highway accidents and with trespass to land as well as with trespass to the person. But he goes on: " . . . and "persons who by the licence of the owner pass near to ware-"houses where goods are being raised or lowered, certainly do "so subject to the inevitable risk of accident. *In neither case, "therefore, can they recover without proof of want of care or "skill occasioning the accident*; and it is believed that all the "cases in which inevitable accident has been held an excuse for "what prima facie was a trespass, can be explained on the same "principle, viz., that the circumstances were such as to show "that the plaintiff had taken that risk upon himself."

Here is no sudden emergence of a rule peculiar to highways, but a rationalisation of what appeared to Blackburn J. to be well-settled law by explaining it on the basis—of which there is no trace to be found in the cases to which he refers—of the voluntary acceptance of risk by the plaintiff. It is to be noted that he refers specifically to warehouse cases, which are not highway cases, and among the other cases alluded to in which "inevitable accident has been held an excuse for what prima facie "was a trespass"[21] must be included, although it was not expressly cited, *Weaver* v. *Ward* [22]—the trained band shooting accident—in which the Court of Common Pleas expressed that view. But what is even more germane to the matter which I have to decide is that that great lawyer, who, having been called to the Bar in 1838 and to the Bench in 1859, must have been very familiar with the practice at nisi prius, appears in the passage italicised to have regarded it as a commonplace that, in all cases in which inevitable accident is an excuse for what, prima facie, was a trespass, the onus of proving negligence lies upon the plaintiff.

Nine years later, in *Holmes* v. *Mather*,[23] an equally great common lawyer, Bramwell B., stated the same proposition quite generally: "The result of the cases is this, and it is intel-"ligible enough: if the act that does an injury is an act of

[19] (1866) L.R. 1 Ex. 265.
[20] Ibid. 286, 287.
[21] Ibid. 287.
[22] (1617) Hob. 134.
[23] (1875) L.R. 10 Ex. 261, 268.

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"direct force vi et armis, trespass is the proper remedy (if there "is any remedy) where the act is wrongful either as being wilful "or as being the result of negligence. Where the act is not "wrongful for either of those reasons no action is maintainable, "though trespass would be the proper form of action if it were "wrongful." I am aware of the textual criticism to which this passage has been subjected by the learned editor of the current edition of Pollock on Torts. But the Law Reports version was, I suspect, then, as now, corrected by the judge. Furthermore, the conclusion stated by Bramwell B. to be the result of the cases up to 1875 accords not only with what my own examination of them suggests, but also with what Blackburn J. had said in 1866. Two years later, in 1877, the speech of Lord Blackburn in *River Wear Commissioners* v. *Adamson*[24] applied to trespass to property adjoining a navigable water the principle which he had adumbrated obiter in *Fletcher* v. *Rylands*[25] in relation to trespass to property adjacent to a highway. This speech, since it is directed to trespass to land and not to trespass to the person, would, strictly speaking, be irrelevant to the present case were it not for the fact that it seems to have been regarded as authority for the proposition that in all cases of trespass to the person, to goods, or to land, there is a special rule peculiar to highways: see *per* McCardie J. in *Gayler and Pope* v. *Davies*.[26] No doubt there is a special rule as respects trespass to land adjoining a highway; but there is no reason to suppose that Lord Blackburn in *River Wear Commissioners* v. *Adamson*[27] was dealing with any other tort than trespass to land, or seeking to modify in relation to trespass to the person the generality of his observations in *Fletcher* v. *Rylands*,[28] or those of Bramwell B. in *Holmes* v. *Mather*.[29] This brings me to *Stanley* v. *Powell*,[30] a case of a shooting accident, not on a highway, in which Denman J. held that trespass to the person would not lie in the absence of negligence by the defendant. The action was originally pleaded in negligence, the onus of proof of which undoubtedly lay upon the plaintiff, and the jury had found that there was no negligence—or, I suppose, more accurately, that the plaintiff had not proved any negligence on the part of the defendant. There are phrases in the judgment of Denman J. which can be read as suggesting that his view was that, had the action been framed in trespass to the person, the onus of negativing negligence would have lain upon the defendant. But this can hardly have been present to his mind or he would presumably have ordered a new trial. I regard the decision as neutral on the question of onus of proof.

Stanley v. *Powell*,[30] although assailed by some textbook writers, has stood for nearly 70 years. It was approved by all members of the Court of Appeal in *National Coal Board* v.

[24] (1876) 2 App.Cas. 743, 767.
[25] (1866) L.R. 1 Ex. 265, 286, 287.
[26] [1924] 2 K.B. 75, 82.
[27] (1876) 2 App.Cas. 743.
[28] (1866) L.R. 1 Ex. 265, 286, 287.
[29] (1875) L.R. 10 Ex. 261, 268.
[30] [1891] 1 Q.B. 86.

Evans [31]—an approval which, it may be, was obiter. I have, however, no doubt that the decision in *Stanley* v. *Powell* [32] is good law.

Little assistance is to be obtained from any later cases. Since *Stanley* v. *Powell*,[32] and perhaps as a result of that decision, there appears to be no case in the reports where unintentional trespass to the person has been relied upon as distinct from negligence, despite the encouragement of the learned authors of the article on Trespass and Negligence in the Law Quarterly Review in 1933 (45 Law Quarterly Review, 359), and the continued appearance in successive editions of Bullen & Leake of a precedent of a pleading in trespass to the person in which neither intention nor negligence is alleged. No doubt in many cases it is the master who is sued for the act of his servant, and here trespass as opposed to case would never lie; but in the 68 years which have passed since *Stanley* v. *Powell* [32] there must have been many cases where the injury to the plaintiff was the direct consequence of the act of the defendant himself. But no practitioner seems to have thought, and certainly no court has decided, that to do so would affect the onus of proof.

I think that what appears to have been the practice of the profession during the present century is sound in law. I can summarise the law as I understand it from my examination of the cases as follows:

(1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part.

(2) Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place.

(3) If it were right to say with Blackburn J. in 1866 that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken upon himself the risk of inevitable injury (i.e., injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking upon himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful—of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples. For Blackburn J., in the passage I have quoted from *Fletcher* v. *Rylands*,[33] was in truth doing no more than stating the converse of the principle referred to by Lord Macmillan in *Read* v. *J. Lyons & Co.*,[34] that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.

[31] [1951] 2 K.B. 861; [1951] 2 T.L.R. 415.
[32] [1891] 1 Q.B. 86.
[33] (1866) L.R. 1 Ex. 265, 286, 287.
[34] [1947] A.C. 156, 170.

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(4) The onus of proving negligence, where the trespass is not intentional, lies upon the plaintiff, whether the action be framed in trespass or in negligence. This has been unquestioned law in highway cases ever since *Holmes* v. *Mather*,[35] and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases. It is, indeed, but an illustration of the rule that he who affirms must prove, which lies at the root of our law of evidence.

I am glad to be able to reach this conclusion, and to know that the Supreme Court of British Columbia has recently done the same (*Walmsley* v. *Humenick*[36]), for "while admiring the "subtlety of the old special pleaders our courts are primarily "concerned to see that rules of law and procedure should serve "to secure justice between the parties": *per* Lord Simon in *United Australia Ltd.* v. *Barclays Bank Ltd.*[37]

If, as I have held, the onus of proof of intention or negligence on the part of the defendant lies upon the plaintiff, then, under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies upon negligence, he must state the facts which he alleges constitute negligence. Without either of such allegations the bald statement that the defendant shot the plaintiff in unspecified circumstances with an unspecified weapon in my view discloses no cause of action.

This is no academic pleading point. It serves to secure justice between the parties. If it is open to the plaintiff—as Mr. McCreery must, I think, contend—on the pleadings as they at present stand to prove that the defendant shot him deliberately, failure to allege such intention deprives the defendant of his right to apply to stay the action pending prosecution for the felony: *Smith* v. *Selwyn*.[38] I should repeat that there is, of course, in fact no suggestion that the shooting here was intentional, and thus felonious. But if Mr. McCreery be right, proof of intention would be open upon the pleading in its present form.

Turning next to the alternative of negligent trespass to the person, there is here the bare allegation that on a particular day at a particular place "the defendant shot the plaintiff." In what circumstances, indeed with what weapon, from bow and arrow to atomic warhead, is not stated. So bare an allegation is consistent with the defendant's having exercised reasonable care. It may be—I know not—that, had the circumstances been set out with greater particularity, there would have been disclosed facts which themselves shouted negligence, so that the doctrine of res ipsa loquitur would have applied. In such a form the statement of claim might have disclosed a cause of action even although the word "negligence" itself had not been used, and the plaintiff in that event would have been limited to relying for proof of negligence upon the facts which he had alleged. But I have today to deal with the pleading as it stands. As it stands,

[35] (1875) L.R. 10 Ex. 261, 268.
[36] [1954] 2 D.L.R. 233.
[37] [1941] A.C. 1, 22.
[38] [1914] 3 K.B. 98.

it neither alleges negligence in terms nor alleges facts which, if true, would of themselves constitute negligence. If Mr. McCreery is right, he would be entitled to prove that the defendant's gun was to his knowledge defective or even that he was short-sighted and had left his spectacles at home, nor would the plaintiff be bound at any time before the trial to disclose to the defendant what facts he relies upon as constituting negligence.

I do not see how the plaintiff will be harmed by alleging now the facts upon which he ultimately intends to rely. On the contrary, for him to do so, will serve to secure justice between the parties. It offends the underlying purpose of the modern system of pleading that a plaintiff, by calling his grievance "trespass to "the person" instead of "negligence," should force a defendant to come to trial blindfold; and I am glad to find nothing in the authorities which compels justice in this case to refrain from stripping the bandage at least from the defendant's eyes.

I hold that the statement of claim in its present form discloses no cause of action.

Leave to make immediate amendments to statement of claim granted. Consequential amendments to defence within 14 days.

Solicitors: *Barnes & Butler for J. W. Miller & Son, Poole; Peacock & Goddard for Trevanion, Curtis & Walker, Bournemouth.*

J. D. P.

[COURT OF APPEAL.]

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Oct. 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23; *Dec.* 8.
Jenkins, Romer and Willmer L.JJ.

Conflict of Laws—Contract—Discharge—Debt payable under contract—Whether discharged—Whether proper law of contract or lex situs of debt applicable.
Conflict of Laws—Chose in action or debt—Discharge.
Conflict of Laws — Contract — Proper law — Lease of movables — Lease entered into "in accordance with the provisions of the laws" of Cuba—Whether conclusive of proper law.
Currency—Contract—Foreign debt—Conversion into sterling—Date for conversion.
Conflict of Laws—Contract—Renvoi—Applicability of doctrine to contract.

The U. Company, a company incorporated in England in 1898, conducted a railway undertaking in Cuba. In 1921 it bought rolling stock worth $14,000,000 and decided to raise part of that sum in the United States of America under a scheme whereby 15-year 7½ per cent. trust certificates should be issued to the public through

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a trust company, which was a corporation of the Commonwealth of Pennsylvania. In February, 1921, the U. Company caused to be incorporated in the United States a subsidiary company to which on March 25, 1921, it sold the rolling stock. By a lease dated April 18, 1921, and executed in New York, the subsidiary company as lessor leased to the U. Company as lessee the rolling stock for a period of 15 years for a rental payable twice yearly at the office of the trust company in Philadelphia. The rentals payable under the lease were to provide principal and interest reserved by the trust certificates, the lease forming security for those payments.

By an agreement executed in New York contemporaneously with the lease, the subsidiary company assigned all its rights under the lease and interest in the rolling stock to the trust company as trustee for the certificate holders. By a further agreement dated April 27, 1922, the subsidiary company resold the rolling stock to the U. Company "subject to and with the benefit of the lease and "the agreement." From February 14, 1931, the U. Company ceased to pay the instalments due under the lease.

In 1953 the Cuban Government, acting under certain decrees enacted for the purpose, acquired the management and control of the U. Company's undertaking and assets by way of sale and purchase. By an agreement dated September 5, 1953, the Cuban Government released the U. Company from all responsibility in respect of liabilities arising under the trust certificates. On March 4, 1954, the U. Company went into voluntary liquidation and the successors of the trust company as trustee for the certificate holders lodged a proof, claiming the instalments that were payable under the lease. On appeal from the liquidators' rejection of the proof:—

Held, (1) that, on the evidence of Cuban law, the sale to the Cuban State of the undertaking left wholly unaffected the rights of the creditors against the company.

Per curiam. Novation of a contract comprises two features: the discharge of the debtor and the substitution of a new debtor; the discharge is controlled by the proper law of the contract.

Antony Gibbs & Sons v. *La Société Industrielle et Commerciale des Métaux* (1890) 25 Q.B.D. 399; 6 T.L.R. 393 applied.

Arab Bank Ltd. v. *Barclays Bank* (*Dominion, Colonial and Overseas*) [1954] A.C. 495; [1954] 2 W.L.R. 1022; [1954] 2 All E.R. 226 distinguished.

(2) (Willmer L.J. dissenting), that the proper law of the lease and the contemporaneous agreement was that of Pennsylvania; that since, according to the law of Pennsylvania, the obligations of the U. Company under the lease were continuing, the trust company could prove in the liquidation for a sum in respect of principal, premium and interest due sufficient to satisfy the proper claims of the certificate holders, such sum, in dollars to be converted into sterling at the rate of exchange prevailing at the date of the winding up.

Per Willmer L.J. The proper law of the lease and the contemporaneous agreement was Cuban. In the circumstances, however, this did not prevent the trust company from proving in the liquidation for a sum in respect of principal, premium and interest due. But such sum, in dollars, was to be converted into sterling at the rates of exchange prevailing at the respective dates at which the instalments comprised in it fell due.

Per curiam: Even if Cuban law were to be regarded as the proper law of the contract, their Lordships were disposed to hold that such law would be the domestic law of Cuba, and not Cuban private international law.

Semble: that the doctrine of renvoi has no application in the field of contract.

Decision of Wynn-Parry J. [1958] Ch. 724; [1958] 2 W.L.R. 229; [1957] 3 All E.R. 641 affirmed.

APPEAL from Wynn-Parry J.[1]

The facts are taken substantially from the judgment of Wynn-Parry J. in the court below.

United Railways of the Havana and Regla Warehouses Ltd. (hereinafter referred to as "the company,"), was incorporated in England on August 2, 1898. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connection therewith. Prior to and during 1921 the company purchased rolling stock, consisting of locomotives and cars, to an aggregate amount of over $14,000,000. For the purpose of financing part of this amount it was decided to raise $6,000,000 in the United States of America under what is known as the Philadelphia Plan, an essentially American scheme for financing a project. A variation from or addition to the procedure normally followed in carrying out the Philadelphia Plan was, however, adopted. What was done was this. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation under the name of Cuba Rolling Stock Co. (hereinafter referred to as "the car company"). The car company was a subsidiary of the company. It was the use of this company in the manner hereinafter to be described, which constituted the variation from or addition to the Philadelphia Plan. On March 25, 1921, the company sold to the car company the whole of the rolling stock, and assigned the contracts for future delivery of so much thereof as had not been delivered. The purchase price was the actual cost of the rolling stock delivered in Cuba. By way of confirming the sale and carrying it into effect, the company and the car company executed a document dated April 11, 1921, which was described as a bill of sale before a notary public in New York. On April 18, 1921, a document, described therein as a lease and agreement (hereinafter referred to as "the lease"), was executed between the car company as lessor and the company as lessee. The lease was executed in New York before a notary public by attorneys in fact for the car company and the company respectively. The attorney in fact for the company was appointed by resolution of a board meeting held in New York pursuant to a power given at a board meeting in London held on February 3, 1921.

The recitals to the lease, so far as material, read as follows: "Whereas, the lessee has power under its charter and the laws "of the Republic of Cuba and the Acts of the United Kingdom "of Great Britain and Ireland to enter into and perform this "agreement, and has taken all necessary corporate action to "authorize the execution and delivery hereof. And whereas,

[1] [1958] Ch. 724; [1958] 2 W.L.R. 229; [1957] 3 All E.R. 641.

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"at the time of the execution hereof the lessor holds contracts "for the construction and acquisition of, or is the absolute owner "of, the railroad equipment and/or rolling stock hereinafter "described, and has agreed to deliver forthwith or as soon as the "same shall be completed, such railroad equipment and/or "rolling stock to the lessee, which agrees to receive the same, "such delivery by the lessor and acceptance hereof by the lessee "to be upon the terms and under the conditions herein set forth: "And whereas, the lessor desires, upon the execution hereof, and "in the manner hereinafter set forth, to assign, transfer and set "over to the Commercial Trust Company of Philadelphia, as trus-"tee all the lessor's right, title and interest in and to this "lease and the rents reserved hereunder, and in and to the rail-"road equipment and/or rolling stock hereby demised. And "whereas the lessee, in consideration of certain rights given to "it to pay rentals in United Railways of Havana 15-year 7½ per "cent. Equipment Trust certificates, and within six months after "certain payments of rental to tender additional certificates and "receive cash in exchange therefor, all as hereinafter specifically "set forth, consents to said contemplated assignment."

Then the lease witnessed: "That for and in consideration of "the sum of one dollar ($1) paid by the lessee to the lessor, as "well as of the rentals and covenants hereinafter mentioned, the "lessor has let and leased and by these presents does let and "lease to the lessee, for the term of fifteen years from the fif-"teenth day of February, 1921, unless sooner terminated as here-"inafter provided, the following described railroad equipment "and/or rolling stock, to wit . . . "; and there followed a detailed list of the rolling stock. It was then provided that the rolling stock was leased "at and for the rental hereinafter set out, and "upon the terms, conditions, and covenants following, to wit:

"First. The lessee shall and will pay to the lessor or its "assigns at the office of Commercial Trust Company, hereinafter "called 'the trustee,' in the City of Philadelphia, Pennsylvania, "or at the office of Central Union Trust Company of New York, "in the City of New York when payment in New York is herein-"after specifically required, as rental for the said railroad "equipment and/or rolling stock without deduction for any taxes, "duties, charges or assessments, which the lessee may be required "to pay or withhold under the laws of the United States of "America or of any other country": This made clear that the primary place of payment was Philadelphia. New York was only used for the payment of interest, as emerged from the provisions of paragraph I (a), which followed, and which, so far as material, read as follows:

"I. Half-yearly on the fourteenth day of February, and on "the fourteenth day of August in each year, the first payment to "be made on August 14, 1921. (a) A sum payable in New York "equal to 3¾ per cent. of the par value of certain certificates not "exceeding $6,000,000 issued under an agreement bearing even

"date herewith between Cuban Rolling Stock Company, and "Commercial Trust Co., trustee, and outstanding and unpaid "on the fourteenth day of February and the fourteenth "day of August, respectively in each year, during the term of "this lease, and an amount equal to the accrued dividends on the "certificates purchased by the trustee during the preceding six "months under the provisions of the said agreement; less such "sums derived from investments by the trustee of undistributed "rentals in its hands, as reported from time to time by it to the "lessee as applicable to the payment of dividend warrants on "the aforesaid certificates."

Sub-paragraphs (b) and (c) dealt with the reasonable expenses of the car company and taxes on the property leased or the income therefrom which were to be paid by the company and would be payable in Philadelphia. By paragraph II provision was made for bi-annual payments on August 14 and February 14 in each year covering the period from August 14, 1921, to February 14, 1936, of sums which were treated as rentals. The payments of interest under paragraph I (a) and the bi-annual payments under paragraph II were calculated to cover the interest and capital and premium payable in respect of the certificates referred to in paragraph I (a). It was then provided that all the bi-annual payments mentioned in paragraph II were to be made in gold coin of the United States of America of the 1921 standard of weight and fineness; and there followed a provision allowing, under certain conditions, payment by delivery up of certificates purchased by the company. The last provision of clause first allowed the company to pay on any rental day a lump sum sufficient to "enable the trustee to call for retirement and to "retire on the dividend date next ensuing all outstanding United "Railways of Havana 15-year 7½ per cent. Equipment Trust "certificates by the payment of the par value thereof and a "premium of 10 per cent. thereon and accrued dividends thereon "to the date of retirement." This provision served to emphasise that the payments under the lease were designed to provide the principal and interest reserved by the certificates, the lease forming the security for those payments.

Clause second provided that all the rolling stock and replacements, the subject of the lease, were "to be plainly marked and "kept marked on both sides thereof with the words: 'Commer-"'cial Trust Company, Trustee, Phila., Pa., Owner and Lessor, "'U. H. Equipt. Trust No. . . .'." Clause fourth required the company "to keep the said railroad equipment and/or rolling "stock insured in some incorporated insurance company or com-"panies of good standing, organised under the laws of the "United States of America or of the United Kingdom of Great "Britain and Ireland, to be approved by the trustee, assignee of "the lessor. . . ." Clause fifth, so far as material, read as follows: "The lessee further covenants that there shall be no "assignment or transfer of its rights or interest in said railroad

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"equipment and/or rolling stock under this lease, or any under-"letting of said leased property, without the consent of the "lessor and its assigns endorsed hereon." Clause sixth provided that in case of default in the payment of any of the rentals, the car company might declare the lease terminated and might take possession of the rolling stock. Clause seventh provided that in that event the lessee was to move the rolling stock to such points on the railroad as the lessor or its assigns should designate and deliver up the same, "and it is hereby expressly covenanted "between the lessor and the lessee that performance of this "covenant as herein set forth is of the essence of the contract "between the parties and that upon application to any court "having jurisdiction in the premises the said lessor, its successors "or assigns, shall be entitled to a decree against the lessee "requiring specific performance hereof." Clause eighth was of importance, and, so far as material, read as follows: "It is "understood and agreed by and between the lessor and the lessee, "that the lessor may forthwith, upon the execution hereof, "assign, transfer, and set over unto Commercial Trust Company, "of Philadelphia, as trustee, all the lessor's right, title, and "interest in and to said railroad equipment and/or rolling stock "hereby leased unto the lessee, and as well all of the lessor's "claims, demands, and remedies, under this lease accruing or to "accrue . . . and that when it, the lessee, shall have fully paid "all the rents, which it has herein covenanted to pay, the said "railroad equipment and/or rolling stock may be re-assigned by "said Commercial Trust Company, of Philadelphia, trustee, to "the lessor, and upon such re-assignment and the expiration of "the term of this lease, all said railroad equipment and/or rolling "stock shall revert to the lessor." Clauses eleventh and twelfth were also important and were as follows:

"Eleventh. It is the intention of the parties to this lease "to enter into and execute this lease in accordance with the "provisions of the laws of the Republic of Cuba to the end that "this lease may be deposited or filed and/or registered there-"under, and the railway company agrees to so deposit and/or "register or file the same, and to record the same in such State "or territories of the United States as may be required by law, "and to perform any other act required by law that may be "necessary to protect the trustee's title. In case it becomes "necessary that this lease be translated into the Spanish "language in order that it may be filed and/or registered in the "proper offices in the Republic of Cuba, then and in that event "it is understood and agreed that the English text shall govern "in case of any conflict between the English and Spanish texts.

"Twelfth. The parties hereto submit themselves to the juris-"diction of the tribunals of the City of Havana, in the Republic "of Cuba, for all notifications, summonses and other judicial or "extra judicial formalities to which this lease shall give rise, with "express renunciation of their own jurisdiction if different."

At the same time as the lease was executed, there was also executed in New York an agreement (hereinafter referred to as "the trust agreement") between the car company and Commercial Trust Co., of Philadelphia, a corporation of the Commonwealth of Pennsylvania, to which, and to whose successors as such trustee, reference will be made as "the trustee." The agreement recited the lease, and the second recital, so far as material was: "And whereas, the car company has purchased "the said railroad equipment and/or rolling stock particularly "mentioned in the lease and has agreed to apply in part payment "therefor the proceeds of six million dollars ($6,000,000) par "value of equipment trust certificates, to be issued under the "terms of this agreement, and known as certificates of the "United Railways of Havana 15-year 7½ per cent. Equipment "Trust." Then by clause first the car company assigned to the trustee as trustee for the certificate holders, the lease and all its interest in the rolling stock. By clause second the trustee covenanted "that it will from time to time execute and deliver "to the car company or upon its order in writing United "Railways of Havana 15-year 7½ per cent. Equipment Trust "certificates" [hereinafter referred to as "the certificates"] "aggregating in par value $6,000,000." Then the clause set out the intended form of the certificates. It was framed to fit in with the payment provisions of the lease: for instance, the due date of payment was February 15, 1936, the day after the day fixed for payment of the last rental under the lease, and payment was to be made at the office of the trustee in Philadelphia in gold coin of the United States of America, as provided in the lease, "but only from and out of the rentals when paid as "provided for in the lease . . . which rentals are payable to "the trustee for the benefit of" the certificate holders. Clause fourth dealt with the issue of the certificates. The money which the company required was provided pursuant to an underwriting agreement consisting of a letter dated February 9, 1921, written by Dillon Read & Co. of New York, as underwriters, to the then chairman of the company, and accepted by him. Clause seventh opened: "In the event of default by the railway company, as "aforesaid, if it be thought necessary or convenient for the "purpose of enforcing and carrying out all the terms and stipula-"tions of the lease and this agreement under the laws and "statutes of the Republic of Cuba"—then provision was made for the assignment of the lease and all rights thereunder, "to "any person or other corporation as substituted trustee "authorised to act or doing business in the Republic of "Cuba." Clauses eleventh and twelfth were similar in terms to clauses eleventh and twelfth in the lease, except that this last paragraph of clause twelfth appeared in the lease as the last paragraph of clause eleventh. By an agreement dated April 27, 1922, the car company resold the rolling stock to the company, "subject to and with the benefit of the lease and the agreement."

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The position, therefore, at this point (without prejudice to any question of Cuban law) was that the company had received the net proceeds of the sale of the certificates to the public. It had the right, subject to performing its obligations under the lease, to have the property in the rolling stock revested in it. In the meantime its only right to the rolling stock was as lessee under the lease. The benefit of the company's obligations under the lease was vested in the trustee as trustee for the certificate holders. Finally, as a result of the resale by the car company to the company, the car company dropped out of the picture and was later dissolved.

Prior to February 14, 1931, the company redeemed certificates to the face value of $3,800,000. Further, it purchased, as it was entitled to do, certificates to the face value of $1,869,000. It defaulted in paying the instalment of $206,000 due on February 14, 1931, and all subsequent instalments. It had thus defaulted in respect of the last eleven instalments of capital, a total of $2,256,000. In this connection it is important to bear in mind that the certificates themselves imposed no liability on the company. The company's liability, assuming that it still existed, arose solely under the lease. Its liability was to pay to the trustee the proper sum in United States of America dollars necessary to discharge its obligations under that document. The certificates, in effect, did no more than evidence the amount which the holders thereof were entitled inter se to receive from the trustee, in so far as the trustee received payment from the company.

Although defaulting as regards principal, the company continued to pay interest as provided by the lease down to and including August 14, 1934. The trustee took no step under clause sixth of the lease to declare the lease terminated. Apart, therefore, from any impact on the continued existence of the lease which Cuban law might have, assuming that it applied in this case, the lease was to be treated as continuing, the company being in default thereunder. The trustee took no step under the same clause to take possession of the rolling stock.

In 1934, 1940 and 1941 legislation was brought into force in Cuba establishing a moratorium owing to the economic depression which had developed during the early 1930s. The benefit of the moratorium laws extended to public service railroad companies. On June 6, 1949, an interventor was appointed by the Cuban Government, who took over the management and control of the company's undertaking. By 1952 it had become clear that the company's financial position was so acute that the only solution was that the whole of its undertaking and assets should be sold to the Cuban Government, if that could be effected. To facilitate this a scheme of arrangement between the holders of the company's various classes of debenture stock and shares was prepared, brought before the court, and sanctioned by Vaisey J. on December 15, 1952. Neither the holders of the certificates

nor the trustee on their behalf were parties to the scheme, but the certificates were mentioned in Part IV, paragraph 13, of the Preliminary to the Scheme, where there was a statement that the certificates were not affected by the scheme. Negotiations for the acquisition of the company's undertaking and assets in Cuba took place and a number of documents were brought into existence, to which reference must now be made. The first was Law-Decree No. 980, dated July 24, 1953. Article 1 opened thus: "This Law-Decree is entitled 'Law-Decree on the acqui-" 'sition, operation and rehabilitation of the United Railways of " 'Havana and subsidiary companies.'" Article 3 authorised the Minister of the Treasury to initiate and conduct negotiations for the acquisition by voluntary agreement, or, failing that, by expropriation, with the object of conveying the undertakings and property acquired to a company to be incorporated for the purpose. Chapter III, article 6, dealt with the incorporation of this company, hereinafter referred to as "Occidentales." Article 8 provided that the State would convey the properties acquired from the company to Occidentales, "and the latter shall assume "the liabilities, which the State shall have contracted by the "acquisition of the properties." Article 13 provided that Occidentales "cannot sell the real estate they acquire as con-"veyed by the State except" as specifically provided in that article. Article 14 opened with the words "The State on making "the conveyance. . . ."

A document entitled "Preliminary Agreement" was dated September 5, 1953. It concerned the company and a wholly-owned subsidiary of the company, hereinafter referred to as "Terminal," as vendors and the Cuban State as purchasers, and provided, in effect, for the sale of the respective undertakings and assets of the two companies to the Cuban State for $13,000,000, "which amount will received . . . at the moment of signing the "public deeds, by virtue of which there shall be transferred to "the State in full and absolute dominion the assets and "properties described in Annex A." Clause Fourth (B) was as follows: "The price agreed upon shall be received by 'The "'Uniteds' and 'The Terminal' free from all responsibility with "respect to liabilities outstanding in Cuba, represented by debts, "obligations and responsibilities arising out of the operations of "the properties which are to be acquired by the State, whether "involving operations prior to June 10, 1949, on which date said "properties passed to the management of the Interventors of the "Government of Cuba, or subsequent to that date." Included in annex A as assets was this item: "$1,867,000 of nominal "value, amount of the company's holding of the 7½ per cent. "Equipment Certificates." On the same day, namely, September 5, 1953, as the preliminary agreement was executed, another agreement—hereinafter referred to as "the confidential agree-"ment"—was executed, the parties being the Cuban State, the National Bank of Cuba and the company. It was of importance,

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and the relevant provisions were as follows. It stated that the parties had agreed: "First: that among the liabilities in respect "of which the State liberates 'The Uniteds' from all respon-"sibility, in accordance with letter B of clause fourth of the pre-"liminary agreement signed on this same date between the same "parties, it is understood to be included the responsibilities that "may derive from the 7½ per cent. Equipment Trust Certificates "which were issued under agreement dated February 15, 1921, "between the Cuban Rolling Stock Company and Commercial "Trust Company, as trustees."

"Second: That what is established by this agreement does "not signify that the State or 'The Uniteds' acknowledge or "admit that there can exist legal merit in any claim, demand "or proceedings that may be established as a result of the "referred to 7½ per cent. Equipment Trust Certificates, but that "it is exclusively established what is mentioned in this agree-"ment in respect thereof for the supposed case that a sentence "may be handed down as a result of any claim, demand or pro-"ceedings derived from said 7½ per cent. Equipment Trust "Certificates, whether it be before courts of justice of the "republic or in foreign courts."

And, finally, in clause fifth, it was provided: "That the con-"tents of the present confidential agreement cannot be revealed "by any of the signing parties, but it will be understood that it "binds them just as if it had been stipulated in the preliminary "agreement referred to in paragraph first."

The second recital of Law-Decree 1197, dated November 26, 1953, is of importance. It stated: "Whereas: In accordance "with the provisions of Military Order No. 34 of 1902, it was "agreed in section (B) of clause fourth of the preliminary agree-"ment executed between the Government and the" company and two other companies "that the said companies as vendors "would receive the agreed price free from all responsibility with "respect to liabilities outstanding in Cuba, represented by debts, "obligations and responsibilities arising out of the operations of "the properties to be acquired by the State, and it is therefore "appropriate to declare that the provisions of section (u), article "1, of Chapter V of the aforesaid Military Order are inapplicable "to the liquidation of the three selling companies, since upon "the passing of such liabilities to the Cuban Government the "latter shall adopt such measures as it may deem appropriate "for the liquidation thereof." Article second provided that: "Section (u), article 1, chapter V, of Military Order No. 34 of "1902 is declared inapplicable to the liquidation and dissolution "of the" company and two other companies.

By a deed of purchase dated December 1, 1953, the sale by the company of its undertaking and assets to the Cuban State was completed, the sale being "in a real and effective manner abso-"lutely free from encumbrances." The seventeenth clause pro-vided: "That in consequence of the sale hereby accomplished,

"they transfer in favour of the Cuban State the full and absolute "dominion and possession, with such further rights and equities, "real and personal, without any exception, as the vendors have "or hold in the properties before mentioned, the Cuban State "receiving them as its own, acquired by a just and legitimate "title, as is the present deed, which at all times shall be con-"sidered as symbol of real delivery and possession and leaving "the Cuban State subrogated in the same place and stead of the "vendors." The twentieth clause read as follows: "That in the "purchase-sale are included all the assets and any other properties "situated in the Republic of Cuba, without exception whatsoever, "which comprise and constitute the railroad system which the "vendors have been operating." On the same date as the deed of sale was executed, namely, December 1, 1953, a document, which was not in evidence and the precise terms of which were not known, was executed, the parties being the Cuban State and a company herein referred to as "Occidentales," by which the Cuban State sold to Occidentales the undertakings which it had acquired. It was thought at first that this sale comprised all the assets acquired, but it emerged in evidence during the hearing before Wynn-Parry J. that certain property was retained by the State. The purchase price was duly paid by the Cuban State in United States Treasury Bonds. These were then sold for sterling, the proceeds being applied in effect in accordance with the provision of the scheme of arrangement. On March 4, 1954, the company went into voluntary liquidation.

On June 18, 1954, the respondent, who was the present trustee for the certificate holders, lodged a proof. The basis of the claim appeared in paragraph 4 of the proof, which read as follows: "The claimant is the present trustee for the holders of the said "certificates, being the successor in office of Commercial Trust "Company of Philadelphia the original trustee thereof. The "liability of the company to the claimant which is the subject-"matter of this proof arises under or by virtue of a covenant by "the company with Cuban Rolling Stock Company contained in "an agreement dated February 15, 1921, but executed on April "18, 1921, between the said Cuban Rolling Stock Company of the "one part and the company of the other part the benefit whereof "including the ownership of the said railway equipment was by a "trust agreement dated February 15, 1921, but executed on "April 18, 1921, assigned by the said Cuban Rolling Stock "Company to the said original trustee of whom the claimant is "the successor in title."

Paragraph 2 of the proof quantified the claim under four heads as follows: "2 (a) The sum of £264,076 0s. 1d. being the sterling "equivalent on the said date (calculated at the rate of 2.80 "dollars to the £) of 739,412.81 United States dollars due and "payable to the claimant in respect of 333,000 dollars in face "value of United Railways of Havana 15 year 7½ per cent.

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" Equipment Trust Certificates then outstanding in the hands of " members of the public as follows namely a sum equal to:

" Face value	333,000.00	dollars
" Premium of 2½ per cent. on the said " face value	8,325.00	
" Interest at the rate of 7½ per cent. " per annum on the said face value " from August 15, 1935, to February " 14, 1936	37,462.50	
" Interest at the rate of 6 per cent. " per annum on the said face value " from February 15, 1936, to March " 4, 1954	360,625.31	
	739,412.81	dollars

" (b) In addition thereto the sum of £11,177 6s. 9d. being the " sterling equivalent at the rate of 2.80 dollars to the £ of " the aggregate amount of the reasonable expenses incurred by the " claimant down to March 4, 1954, in the performance of the trust " under which the said certificates were issued. Details of the said " expenses are as follows:

" Out of pocket expenses of claimant	2,255.46	dollars
" Claimant's legal expenses	20,000.00	
" Claimant's fee as trustee at 275 " dollars per annum	9,041.10	
	31,296.56	dollars

" (c) In addition thereto the sum of £20,000 being the sterling " equivalent of the amount which the claimant estimates to be " the value of its future or contingent claim in respect of expenses " incurred or to be incurred by it subsequent to March 4, 1954, " in the performance of the said trusts until the same shall have " been fully performed.

" (d) In addition thereto (subject as hereinafter mentioned) " £1,480,570 5s. 7d. being the sterling equivalent on March 4, " 1954 (calculated at the rate of 2.80 dollars to the £), of " 4,145,596.78 United States dollars, due and payable to the " claimant in respect of 1,867,000 dollars in face value of United " Railways of Havana 15-year 7½ per cent. equipment trust " certificates which had been purchased by the company as " follows, namely a sum equal to:

" Face value	1,867,000.00 dollars
" Premium on 2½ per cent. on the said " face value	46,675.00
" Interest at the rate of 7½ per cent. " per annum on the said face value " from August 15, 1934, to February " 14, 1936	210,037.50
" Interest at the rate of 6 per cent. per " annum on the said face value from " February 15, 1936, to March 4, " 1954	2,021,884.28
	4,145,596.78 dollars."

The court was not concerned with paragraph 2 (d) of the claim, because any claim in respect of those certificates was renounced, and on that basis Roxburgh J., by an order of December 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of those certificates. The main claim was a claim in contract under the lease. Two alternative claims in paragraph 4 were abandoned at the hearing before Wynn-Parry J., but the trustee pursued, as alternative to his main claim and as alternative to each other, two further claims, the first for damages for breach of the covenant in the lease not to assign the rolling stock without the consent of the trustee, and the second for damages for conversion of the rolling stock by the company. In connection with the last two items, it is relevant to mention that in a letter dated July 2, 1953, from the secretary of the company to the trustee, it was stated that for financial reasons the insurances effected by the company were being reduced in amount, and, in pursuance of that policy, the insurance of the rolling stock had been reduced to a value of $2,000,000, " being " the estimate of the present day value of this rolling stock " calculated by reference to an inventory made in June, 1948, " subject to depreciation since then." On November 19 the liquidators rejected the proof. From this rejection the respondent appealed. Wynn-Parry J. allowed the appeal. The liquidators appealed.

John Megaw Q.C., *Kenneth Mackinnon Q.C.* and *Richard Hunt* for the liquidators.

R. O. Wilberforce Q.C. and *R. B. S. Instone* for the trustee for the certificate holders.

The following cases, in addition to those referred to in the judgments, were cited in argument: *F. & K. Jabbour* v. *Custodian of Israeli Absentee Property*[2]; *In re Claim by Helbert Wagg &*

[2] [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145.

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Co. Ltd.[3]; *New York Life Insurance Co.* v. *Public Trustee*[4]; *In re Fitzgerald*[5]; *Belsize Motor Supply Co.* v. *Cox*[6]; *Lazard Brothers & Co.* v. *Midland Bank Ltd.*[7]; *Rouyer Guillet* v. *Jackson Knowland & Co.*[8]; *Ellis* v. *McHenry*[9]; *Merwin Pastoral Co. Proprietary Ltd.* v. *Moolpa Pastoral Co. Proprietary Ltd.*[10]; *Adams* v. *National Bank of Greece and Athens S.A.*[11]; *Rex* v. *Payne*[12]; *Swiss Bank Corporation* v. *Boehmische Industrial Bank*[13]; *In re Azoff-Don Commercial Bank.*[14]

Cur. adv. vult.

December 8, 1958. JENKINS L.J. The judgment I am about to deliver is the judgment of my brother Romer and myself. It is concurred in by my brother Willmer except on certain aspects of the case, as to which he will be delivering a separate judgment.

This is an appeal by the liquidators in the winding up of United Railways of Havana and Regla Warehouses Ltd. (a company incorporated in England in the year 1898 and hereinafter called "the company") from an order of Wynn-Parry J., dated November 19, 1957, to the effect that a proof of debt lodged on behalf of the trustee for the holders of an issue of certificates known as "United Railways of Havana 15-year 7½ per cent. "Equipment Trust Certificates" should be admitted for a sum to be computed in the manner described in such order.

The present trustee for the holders of these certificates and respondent in this appeal is the First Pennsylvania Banking and Trust Co., a corporation of the Commonwealth of Pennsylvania in the United States of America, and is the successor in office of the Commercial Trust Co. of Phildelphia, another Pennsylvanian corporation which was the original trustee. References in this judgment to "the trustees" are to be understood as meaning the original trustee or its successor as the context may require.

Wynn-Parry J.'s full and careful survey of the documents, acts and events leading up to the present dispute enables us to go straight to the points at issue in this troublesome case, referring to particular facts and documents as and when relevant to the matter under discussion.

The basic question in the case is whether at the commencement of the voluntary winding up of the company on March 4, 1954, the company was indebted to the trustee under the covenant by the company for the payment of rentals contained in the lease of April 18, 1921, of the rolling stock by the car company to the company, the benefit of which was assigned by the car company to the trustee under the trust agreement of even date.

[3] [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.
[4] [1924] 2 Ch. 101; 40 T.L.R. 430.
[5] [1904] 1 Ch. 573.
[6] [1914] 1 K.B. 244.
[7] [1933] A.C. 289; 49 T.L.R. 94.
[8] [1949] 1 All E.R. 244n.
[9] (1871) L.R. 6 C.P. 228.
[10] (1932) 48 C.L.R. 565.
[11] [1958] 2 Q.B. 59; [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3.
[12] [1902] A.C. 552.
[13] [1923] 1 K.B. 673; 39 T.L.R. 179.
[14] [1954] Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947.

If this question fell to be determined according to English law, it would admit of only one answer. According to the express terms of the covenant the company was bound to pay the stipulated rentals, and it was not in dispute that such rentals were in fact in arrear and unpaid, as to the interest element since August 14, 1934, and, as to the element representing instalments of capital, from and including the instalment due on February 14, 1931, down to and including the final instalment due on February 14, 1936, a total of eleven half-yearly instalments in all.

It is no doubt true that the trustee could not in the end be entitled to any greater sum than was required to give full effect to the rights of the holders of the 331 outstanding certificates plus any sum properly allowable for its expenses, and, if it in fact received more than the amount so required, would have to account for the surplus to the liquidators. It is also true that this necessary limitation, coupled with questions as to the rates of exchange from dollars to pounds appropriate to the calculation, might well leave room for argument as to the proper way of quantifying the amount for which the trustee could prove in the winding up in respect of this indebtedness; but there could be no doubt whatever that it was a provable debt.

Mr. Megaw, for the liquidators, did in fact raise a subsidiary argument of some weight as to the quantum of the trustee's proof, to which we will later return, but according to his submission this question does not arise, for the simple reason that the right to receive and obligation to pay the debt outstanding under the lease was governed by the law of Cuba either (a) because the situs of the debt was in Cuba, or (b) because the proper law of the contract constituted by the lease was Cuban law. If he was right in claiming the application of Cuban law to the debt on either of these grounds, it followed, according to his argument, that under Cuban law the sale of the company's undertaking to the Cuban State on December 1, 1953, had the effect of transferring the liability for the debt from the company to the Cuban State, or, in other words, brought about a compulsory novation by virtue of which the trustee was compelled to accept the Cuban State as its debtor in lieu of the company.

We propose to begin by examining this argument on the assumption that Cuban law was on one or other of the grounds above stated applicable to this debt. The question then is whether on that assumption the sale to the Cuban State did, according to Cuban law, have the effect of bringing about the compulsory novation for which Mr. Megaw has contended. [His Lordship considered the evidence of Cuban law, and continued:] On this part of the case, that is to say, the question whether, assuming Cuban law to be applicable, there was a compulsory novation in respect of the debts of the company for which the Cuban State assumed liability according to the terms of

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the sale of December 1, 1953, we find ourselves in complete agreement with the view taken by the judge.[1] We think there was no more than an agreement between the company and the Cuban State to the effect that as between those two parties the State should discharge the liabilities referred to and indemnify the company in respect thereof, leaving wholly unaffected the rights of the creditors concerned against the company.

[His Lordship then considered points of Cuban law which by reason of that conclusion were irrelevant, and continued:] As we reject the appellants' submission that in Cuban law their liability under the lease was transferred away from the company to the Cuban State by compulsory novation, Mr. Megaw's further argument, which would have become relevant on the contrary assumption, that novation depends on the lex situs of the debt, and that the situs of the debt now in question was Cuban, does not really arise. We will, however, express our views upon it, for the question whether the lex situs applies is an important one, and considerable argument was addressed to us upon it by counsel on both sides.

Mr. Megaw's first proposition on this subject was that where a question of statutory novation of a debt arises, then, whether the novation results in the substitution of a new creditor for the original creditor or of a new debtor for the original debtor, our law will look and look only to the law of the situs of the debt at the date of the relevant foreign legislation. If, on the other hand, no case of novation arises but only a question of modifying a debtor's obligation under a contract, then our courts will look to the proper law of the contract and not to the lex situs of the debt. A novation of a debt, says Mr. Megaw, involves one single juridical act, and the question whether that act is effectual so as to bind the creditor is to be determined by reference to the lex situs.

Mr. Wilberforce, on the other hand, submitted that novation comprises two distinct elements, viz., the annulment of one debt and the creation of a substituted debt in its place. This difference of approach to the question which is involved in the respective contentions appears to us to be vital and should be considered at the outset. Mr. Wilberforce's view is supported by Anson on Contracts, 20th ed., where it is stated (at p. 263): "A liability "may be assigned with the consent of the party entitled; but "this is in effect the rescission of one contract and the substitu-"tion of a new one in which the same acts are to be performed "by different parties. This is called a novation and it can only "take place by agreement between the parties; novation cannot "be compulsory."

In Wolfe's Private International Law, 2nd ed., p. 458, the following propositions are stated: "The substitution of one debtor "for another is treated either as a novation, that is, an extinction "of an existing debt by the creation of a new one, or as a true

[1] [1958] Ch. 724, 760.

" succession into an obligation which remains in force. The first " method, developed on the basis of Roman Law, is to be found " in English and French municipal laws; the second method " prevails in German law and has been adopted in the legal " systems of Austria, Switzerland and Poland. In both cases " the question whether the old debtor is discharged by the entry " of a new debtor depends on the proper law of the debt. But " whether the entry of a new debtor has taken place must be " determined by the law with which that entry is most closely " connected; this may be the new debtor's personal law or the law " of his place of business, unless he and the creditor have agreed " on a particular legal system."

No express judicial authority was cited to us in support of Mr. Wilberforce's suggested dichotomy, but in our view it is right in principle. The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition upon the creditor of a substituted debtor. It follows from this that although the elements of a statutory novation may, and usually will, be comprised in one statute or decree and, for practical purposes, operate simultaneously, each has nevertheless a separate and distinct legal identity.

If this view be right, the next question is whether both of the elements to which we have referred are regarded by our courts as governed by the lex situs of the debt; for if even one of them is governed by some other law, and, in particular, by the proper law of the contract, Mr. Megaw's proposition cannot be supported.

Is then the first part of a novation, namely, the discharge of a debtor from a contractual liability to pay money, governed by the lex situs (which will normally be the place of the debtor's residence), or by some other, and, if so, what, system of law?

Rule 155 in Dicey's Conflict of Laws, 7th ed., p. 804, is in the following terms: " The validity of the discharge of a contract " (otherwise than by bankruptcy) normally depends upon the " proper law of the contract. (1) A discharge in accordance with " the proper law of the contract is valid. (2) A discharge not in " accordance with the proper law of the contract is not valid."

In the discussion on this rule (ibid., p. 807), the author states: " A contractual debt may, and normally will, be regarded " as ' situate ' at the debtor's place of residence, but the discharge " of a debt, whether by performance or through other events, is a " matter subject not to the lex situs of the debt but to the proper " law of the contract from which it arises."

This comment, and rule 155 itself, seem to be amply supported by authority. Thus, in *Perry* v. *Equitable Life Assurance of the United States of America*,[2] the plaintiff sued in this country upon an insurance policy which had been issued under a contract whereof the proper law was Russian. The rights under the contract had been annulled by Russian legislation, and Branson J.,

[2] (1929) 45 T.L.R. 468.

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giving effect to the proper law, was constrained to dismiss the action. It is true that in that case the date for payment under the policy had not yet arrived when the Russian legislation took effect. We agree, however, with Wynn-Parry J. in his refusal to apply one principle to a contractual obligation to make a future payment and another to a contractual debt presently due.

In our judgment, Dicey's rule 155 applies to a debt which has accrued due under a contract equally with a contractual obligation to make a payment in futuro.

This, as it appears to us, is sufficiently shown by the decision of this court (stated in detail by Wynn-Parry J. in his judgment) in *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux.*[3] That decision was approved by the Privy Council in *New Zealand Loan and Mercantile Agency Co. Ltd.* v. *Morrison,*[4] in which it was held that as the Joint Stock Companies Arrangement Act, 1870, did not apply to the colonies a scheme of arrangement sanctioned thereunder by an English court could not be pleaded by the company concerned in a Victoria court as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim. *Antony Gibbs & Sons'* case[5] was also referred to with approval, but distinguished, by Lord Simonds in *National Bank of Greece and Athens S.A.* v. *Metliss.*[6] It accordingly appears to us that the view which we have expressed, that the question whether a debtor has been discharged from his liability depends on the proper law of the contract, is sufficient in itself to dispose of Mr. Megaw's contention that novation depends on the lex situs; for, on the dichotomy of novation, which we accept, the first limb (viz., the discharge of the debtor) depends upon the proper law of the contract, and Mr. Megaw cannot succeed unless the lex situs applies both to the first limb and to the second.

In the course of his argument on this question, however, he sought to rely on the cases in which resort has been had to the lex situs of a debt where the title to the debt has been in question, that is to say, where under the lex situs the rights of the creditor have been transferred away from him to another. There have been a number of such cases and most of them were considered and analysed by Wynn-Parry J. so fully in the course of his judgment that little is to be gained by referring to them again in this judgment. We should, however, refer shortly to one of the most recent cases on this subject, namely, *Arab Bank Ltd.* v. *Barclays Bank (Dominion, Colonial and Overseas).*[7]

In that case the Arab Bank had a credit balance on the current account with the respondent bank's branch in Jerusalem. The British Mandate over Palestine expired at midnight on May 14,

[3] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.
[4] [1898] A.C. 349.
[5] 25 Q.B.D. 399.
[6] [1957] 3 W.L.R. 1055, 1061; [1957] 3 All E.R. 608.
[7] [1954] A.C. 495; [1954] 2 W.L.R. 1022; [1954] 2 All E.R. 226.

1948, and thereupon the Provisional Council of State and Provisional Government of the State of Israel were constituted. War broke out between Israel and the Arab States, which rendered the further performance of the contract of current account impossible. From the date of the termination of the Mandate the appellant Bank's premises were situate in Arab-controlled territory and the respondent bank's premises were situate in Israel territory. By legislation the State of Israel vested in an official called "the "Custodian of the Property of Absentees," the property in the State of Israel belonging to a class of persons and corporations which included the Arab Bank. The respondents paid the appellants' credit balance, amounting to some £583,000, to the custodian. In 1950 the appellants sued the respondents for this sum. Parker J., this court, and the House of Lords, dismissed the action on the ground that the right to be paid the credit balance, being locally situate in Israel, became subject to the legislation of that State and vested in the custodian and was not recoverable by the Arab Bank from the respondent bank. In the course of his speech Lord Morton of Henryton said [8] that the Arab Bank's right to be paid their credit balance on current account was "suspended, and not destroyed by the outbreak of "war and immediately after the outbreak of war it was locally "situate in the newly created State of Israel. Thus it became "subject to the legislation of that State, was vested in the "custodian and was rightly paid to the custodian by the "respondents."

Mr. Megaw contended that if, as the *Arab Bank* case [9] and other cases show, the lex situs is regarded by our courts as decisive when, under that law, the rights of a creditor are compulsorily transferred to another, the same result should follow where one debtor is compulsorily substituted for another. It appears to us, however, that there is no true analogy between the two cases. The contractual right to receive payment of a debt is an item of property, that is to say, a chose in action. It can be transferred by the creditor to a third party but the validity of the transfer necessarily depends upon the lex situs, because the courts of the country where the debt is have jurisdiction over the title to it. Novation, on the other hand, does not involve the transfer of any property at all, for, as we have already pointed out, it comprises the annulment of one debt and the creation of another. Moreover, in novation a creditor may be vitally prejudiced, whereas it is immaterial to a debtor to whom he pays his debt provided that he gets a good discharge for it. Accordingly, we are unable to accept the suggested application, by analogy, of such cases as the *Arab Bank* case [10] to the present.

The only authority which Mr. Megaw was able to draw to our attention in favour of the proposition that the lex situs governs questions of statutory novation is a passage in the judgment of

[8] [1954] A.C. 495, 529.
[9] [1954] A.C. 495.
[10] Ibid.

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Maugham J. in *In re Russian Bank for Foreign Trade.*[11] In that case a petition to wind up the Russian Bank was presented under section 338 of the Companies Act, 1929, by a person who claimed to be a creditor thereof. For present purposes it is sufficient to say that the evidence on the petition proved that Russian legislation in 1917 and later had transferred the Russian Bank's assets and liabilities to the Soviet Government, and that payment could not be demanded from any other person or body of persons; and that the result of the legislation was to put an end to the juristic existence of banking companies incorporated in Russia, including those which (like the Russian Bank) had branches established in England. The relevant Soviet legislation was described by Maugham J. as being "of a confiscatory "character."[12] The judge, after holding that he had jurisdiction to wind up the bank under section 338 whether or not it had been dissolved or had completely ceased to exist as a company under the laws of Russia, proceeded to consider the position of the petitioner. That gentleman claimed to be a creditor of the bank for some £23,000 representing proceeds of sale of goods sold by the London branch of the bank on his behalf from time to time and not yet paid for. The debt was disputed, and in the course of considering the matter Maugham J. said[13] that there was "a real question in dispute, and that is whether the debt to the "petitioner was or was not locally situate in Russia at the date "of the decrees of 1917 and 1918 above referred to. If it was "locally situate in Russia, it seems to me that as the effect of the "legislation the debt is no longer due by the bank as a corpora-"tion, and that the only claim of the petitioner is against the "Soviet State. By the decree of December, 1917, the assets "and liabilities of the bank within Soviet territory were taken "over by the People's Bank, and this, in my opinion, involved the "destruction of the original debt and a kind of statutory nova-"tion (in some sense, perhaps, only a theoretical one) whereby "the State Bank become liable to discharge it."

Mr. Megaw, in the present case, has, not unnaturally, fastened upon Maugham J.'s reference to statutory novation, and submits that the judge was treating the jus situs of the debt as governing the novation. As appears from the report, the evidence did not satisfy the judge whether the petitioner was a creditor for a debt payable by the Archangel branch of the bank or was a creditor for a debt payable in London. As, however, there were creditors supporting the petition whose debts were locally situate in England, he did not regard this as being a sufficient objection in itself to a winding-up order being made, and he accordingly made such an order, being well satisfied that it was just and equitable so to do.

It is quite true that Maugham J. does seem to have regarded

[11] [1933] Ch. 745; 49 T.L.R. 253.
[12] [1933] Ch. 745, 763.
[13] Ibid. 766.

the Russian law, confiscatory in character though it was, as effective in so far as it annulled the claims of creditors whose debts were payable in Russia and transferred the liabilities to the Soviet Government. It does not appear, however, to have been suggested in argument before him that it was in any way relevant to look to the proper law of the contract in order to ascertain whether the legislative annulment of the bank's liabilities operated as a discharge which was binding on its creditors. It seems to have been assumed on all hands that the lex situs of the bank's debts controlled the creditors' rights and the only question (on this point) which was argued was whether the petitioning creditor's debt—which was, in any case, disputed—was situate in Russia or in England. Moreover, the issue was of subsidiary importance against the background of the far wider question whether, in the highly complex circumstances of the case, the court could and should order the Bank to be wound up and thus undertake the distribution of such assets as came under its control. We cannot, at all events, regard the observations of the judge on which Mr. Megaw relies as constituting an authoritative pronouncement that the novation of a debt, brought about by State intervention, is binding upon the creditor, whatever may be the proper law of the contract, by virtue of the lex situs of the debt and that alone.

Maugham J.'s observations above quoted, were referred to by Vaisey J. in *In re Banque des Marchands de Moscou* [14] and by Roxburgh J. in *In re Banque des Marchands de Moscou (No. 2)* [15] but in neither of these cases was it relevant to inquire whether the claim of creditors who sought in each case to prove in the liquidation of the Banque de Moscou was defeated by Russian law operating as the proper law of the contract or operating as the lex situs of the debt—though in fact Vaisey J. resorted to the proper law of the contract as being the appropriate law to consider. In any event, it seems to us that the *Russian Bank* cases, involving as they did the winding up of foreign organisations already dissolved by their own domestic laws and a consideration of the rights of various types of creditors to prove in liquidations carried out in this country, were cases of so special a character as to afford little guidance in the elucidation and application of principles of private international law in general. As already indicated, we do not think that the novation of debts is a matter to be determined solely by reference to the lex situs, and we respectfully adopt the conclusion of Wynn-Parry J. upon the subject, which he expressed as follows [16]: "In this state of the authorities I come to the conclusion that "the proposition contended for by Mr. Megaw is not established "as a rule of English private international law. To my mind "it would offend against both principle and considerations of

[14] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[15] [1954] 1 W.L.R. 1108; [1954] 2 All E.R. 746.

[16] [1958] Ch. 724, 756.

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"convenience. It must be remembered that, as Dr. Cheshire "says (*Private International Law*, 5th ed., p. 246) 'discharge "'affects the substance of the obligation,' whereas questions of "title to and assignment of the benefit or burden"—the words "or burden" obviously slipped in per incuriam—"of the "obligation do not. Every contract has a proper law; it is the "law which the parties either expressly or impliedly have chosen "to govern their contractual relations. One of the most "important aspects of any contract is the manner in which it "is to be discharged, and one would suppose that the parties "would intend the law which they have chosen as the proper "law to govern that important matter—discharge."

If we are right in accepting the view that, upon analysis, novation comprises two features and that the first (the discharge of the debtor) is controlled by the proper law of the contract, Mr. Megaw's proposition cannot succeed and it is immaterial whether the second feature (the substitution of a new debtor) depends on the lex situs or upon some other law. In these circumstances we prefer to express no concluded opinion upon that question. There is obviously, however, much to be said for the view expressed in Wolfe's Private International Law (supra) that the question should be determined by the law with which the entry of the debtor is most closely connected and that, in the absence of some agreement to the contrary, such law might be the new debtor's personal law or the law of his place of business.

As ancillary to Mr. Megaw's submissions as to the lex situs it was, of course, necessary for him to establish that the liabilities which are in question in the present case were, in 1953, situate in Cuba. Inasmuch as we have been unable to accept Mr. Megaw's main submission, and in any event are of opinion, as already indicated, that no novation was effected by the relevant Cuban legislation, the question of the locality of the company's debt becomes wholly academic; and we think it unnecessary to burden this judgment with a consideration of it.

We now turn to the question of what was the proper law of the lease. This would be relevant to the issue of novation had we accepted the appellants' contention as to the novationary effect of the legislation upon which the contention was founded. The question is, however, also directly relevant to the issues which arise out of the moratorium legislation in Cuba which we consider hereafter; for if, as the respondents contend and as the judge held, the proper law of the lease was Pennsylvanian, the appellants cannot, as they concede, rely upon the moratorium legislation.

In an inquiry as to what is the proper law of a contract in which the parties have not expressed their own selection of the law to be applied, many matters have to be taken into consideration. Of these, the principal are the place of contracting, the place of performance, the places of residence or business of the

parties respectively, and the nature and subject-matter of the contract (Dicey, pp. 719, 720, citing Falconbridge, Selected Essays on The Conflict of Laws, 2nd ed., p. 378). But, as the editor points out, the most satisfactory formulation is that the proper law is the one "with which the transaction has its "closest and most real connection" (*per* Viscount Simonds in *Bonython* v. *Commonwealth of Australia*[17]). "The country in "which [the contract's] elements are most densely grouped will "represent its natural seat and the law to which in consequence "it belongs. It may have factual links with several countries, "each of which has some claim to be considered . . . In most "cases, however, an examination of these connecting ties will "disclose without undue difficulty the country with which the "contract is in fact most closely connected and in which it has "its natural seat and centre of gravity." (Cheshire's Private International Law, 5th ed., p. 207.)

It is further to be observed that the fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole (*Hamlyn & Co.* v. *Talisker Distillery*[18]). Different parts of a contract may be governed by different laws, though "the courts of this country will not split the contract "readily and without good reason" (*per* Lord MacDermott in *Kahler* v. *Midland Bank Ltd.*[19]).

Wynn-Parry J. held that the proper law of the lease was Pennsylvanian, and the appellants have not persuaded us that he was wrong. It seems reasonably clear to us that the trust agreement between the rolling stock company and the commercial trust company was not intended by the parties to be governed by Cuban law. Both parties to the agreement were American corporations. Under the agreement the trust company were to issue to the rolling stock company $6 million equipment trust certificates and the latter company were to transfer to the trust company the lease and all its right, title and interest in and to the rolling stock. The trust company were to hold the rights and interests so transferred as trustee for the holders of the certificates. The certificates were to be retired not later than February 15, 1936, upon surrender thereof at the trust company's office in the City of Philadelphia, and in the meantime dividends would be payable in New York. Par value of the certificates, premium and dividends were to be payable in gold coin of the United States of America of 1921 standard of weight and fineness out of the rentals received under the lease. The trust company was to keep at its office in Philadelphia a register in which the holders of certificates might have the same registered.

Pausing there, it could scarcely be doubted but that the agreement was essentially an American, and not a Cuban, contract,

[17] [1951] A.C. 201, 219.
[18] [1894] A.C. 202.
[19] [1950] A.C. 24, 42; 65 T.L.R. 663; [1949] 2 All E.R. 621.

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especially when it is remembered that in 1921, at all events, trusts such as that which was created by the agreement were virtually unrecognised by the domestic law of Cuba. There follow, however, in the agreement certain provisions which were to take effect in the event of the railway company defaulting in payment of the rentals reserved in the lease and, for relevant purposes, clause seventh is the most important. It is in the following terms: [His Lordship read it and continued:] Inasmuch as the rolling stock, which was to be the security for the certificate holders, was situate in Cuba, it is clear that events might well arise which would render resort to the Cuban courts by someone who was qualified to apply to them both necessary and desirable in the event of default by the railway company. That, however, is to our minds quite insufficient ground for attributing to these American contracting parties an intention that the trust agreement as a whole should be governed by Cuban law. So also with clauses eleventh and twelfth on which the appellants relied. These are as follows: "Eleventh. It is "the intention of the parties to this agreement to enter into and "execute this agreement in accordance with the provisions of "the laws of the Republic of Cuba to the end that this agreement "may be deposited, filed, and/or registered thereunder, and the "Car Company agrees to so deposit, file and/or register the same "and to record the same in such States or Territories of the "United States as may be required by law. Twelfth. In order "to facilitate the filing and/or registering of this agreement, the "same may be simultaneously executed in several counterparts, "each of which so executed shall be deemed to be the original, "and such counterparts shall together constitute but one and "the same instrument. In case it becomes necessary that this "agreement be translated into the Spanish language in order "that it may be filed and/or registered in the proper offices in "the Republic of Cuba, then and in that event it is understood "and agreed that the English text shall govern in case of any "conflict between the English and Spanish texts."

We read these clauses as designed to ensure that the formal execution of the agreement should be in accordance with Cuban law and be registrable thereunder accordingly. No further or other significance can, in our judgment, be fairly attributed to them.

In our opinion, therefore, except to the limited extent to which the law and courts of Cuba were invoked for the purpose of clauses seventh and eleventh, the proper law of the agreement cannot be regarded as Cuban. Mr. Megaw says that if the parties had intended the proper law to be American they would have indicated whether they had in mind the law of some particular State, that is, Pennsylvania, New York or (possibly) Delaware, in which the rolling stock company was domiciled. As to this, however, we think that Delaware can be safely ruled out and

New York only comes into the picture as being the place designated for payment of the interest on the certificates. We accordingly agree with the judge in thinking that the proper law to be attributed by the court to this agreement was that of Pennsylvania but not, at all events, that of Cuba.

It has been material to consider the agreement in this connection because it was held by the judge, and argued before us by counsel for the respondents, that the proper law of the agreement and of the lease was intended to be the same. This is probably, though not, we think, inevitably, true. In the words of the judge [20]: "The lease is expressly recited in the agreement, "and in the lease there is a recital of the intention immediately "to assign the benefit of the lease to the trustee. The two "documents are essential parts of the same transaction, namely, "the Philadelphia Plan. In those circumstances one would "expect that they would each have the same proper law, "and I hold that they have." One certainly cannot ignore the fact that each of the two documents constituted essential parts of one entire transaction and it would, we think, be unusual if the parties concerned in that transaction should desire one part to be governed by the law of Cuba (which is in many relevant respects totally different from American law) and the other part to be governed by the law of Pennsylvania. It is, however, necessary to consider the provisions and objects of the lease. [His Lordship read the relevant provisions of the lease, and continued:] On the terms of the lease, then, read in conjunction with those of the trust agreement, with which it was associated, what was the proper law which the parties intended, or must be deemed to have intended, should govern its performance? What was the country with which it had "its closest "and most real connection," the country "in which it had its "natural seat and centre of gravity"?

Mr. Megaw, in contending that that country was Cuba, relied on the reference in clause seventh to "any court having juris-"diction in the premises" and suggested that that reference was to the courts of Cuba and foreshadowed clause twelfth of the lease. He further submitted that the subject-matter of the lease was rolling stock in Cuba or to be delivered there; the payments reserved were expressed to be rentals deriving from the operation of the company in Cuba, and, on default, the certificate holders' security, that is, the rights and interests in the rolling stock, could only be enforced in Cuba; that practically the whole of the lease was concerned with the preservation of this security and the protection of the trustee's title to it in Cuba; that clauses eleventh and twelfth are entirely comprehensive in their scope and indicate a rejection of all law in relation to the lease other than Cuban; and, finally, in this connection also, he relied on the contention, already mentioned, that if the parties had American law in mind,

[20] [1958] Ch. 724, 757.

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they would surely have indicated some particular State (a point with which we have sufficiently dealt already).

On the other hand, Mr. Wilberforce submitted that the lease and the trust agreement, which were executed on the same day, were both parts of the so-called Philadelphia Plan, which was purely a financial transaction embodying provisions for a loan and for the repayment thereof; that the lease, which constituted a security but not a mortgage for the repayment of the loan, was merely a convenient piece of mechanism; that the Philadelphia Plan was wholly foreign to the law of Cuba; that all payments under the lease were to be in United States of America gold coin and payable in the United States to a trustee resident in that country; that surely the parties could not have intended that questions which might well arise from some alteration in the American gold clause legislation or as to the remuneration and expenses of the trustee and the like should be dealt with by the Cuban courts in accordance with Cuban law. Mr. Wilberforce presented the entire transaction (of which the lease formed an ingredient) as an essentially American (Pennsylvanian) transaction with a Cuban element in it. Clauses seventh, eleventh and twelfth of the lease were introduced, he submitted, because of the presence of this element but are insufficient to transform what was an obviously American contract into a Cuban one, so that all of the contractual obligations should be governed by Cuban law.

In our opinion the respondents' contention on this matter is preferable to that of the appellants. It does not seem to us that the effect of clause 7 of the trust agreement, or of clauses seventh, eleventh or twelfth of the lease, is to attract the operation of Cuban law to the lease except for limited purposes. In our judgment the words " to the end that " limit the scope of clause eleventh of the lease just as it limited the scope of clause eleventh of the trust agreement, save that the clause in the lease extends also to the performance under Cuban law of such acts as might be required to protect the trustee's title. Similarly, in clause twelfth of the lease, the submission to the jurisdiction of the tribunals of the city of Havana is, significantly, for the purpose of " notifications " and specified " formalities." In view of these purposes, expressly described, it seems to us difficult in the extreme to suppose that the parties were intending to submit themselves to the law of Cuba for all the purposes of the lease—" expressio unius exclusio alterius est." And as to clause seventh the reference to " specific performance " is a strong reminder of the principles of equity for so long known and applied by our courts and those of the United States.

We accept, without repeating them, the reasons advanced by Mr. Wilberforce for the view that although the lease, as also the trust agreement, was intended in some of its aspects to be governed by the law of Cuba, nevertheless the proper law of the

contract as a whole, the general law which was to govern its performance, was not that of Cuba but the law of Pennsylvania or (possibly) of Philadelphia. In our opinion there is ample justification, dictated by the nature of the transaction and by the terms of the trust agreement and the lease, for holding that both these documents are severable in relation to the law which governs their performance; and that while Cuban law was clearly intended to be applicable to certain aspects of the agreement and the lease, nevertheless the proper law of both these contractual documents was that of Pennsylvania or Philadelphia.

While accepting the respondents' contention that the proper law of the trust agreement and of the lease was not the law of Cuba we are not prepared, as at present advised, to accept their alternative suggestion that had the proper law been Cuban the relevant law to apply would nevertheless, on the evidence of Dr. Gorrin and by virtue of the renvoi doctrine, have been that of Pennsylvania. This view does seem to have been accepted by the judge and receives some support from the judgment of the Privy Council, delivered by Lord Wright, in *Vita Food Products Inc.* v. *Unus Shipping Co.*[21] This passage from the judgment of the Judicial Committee has, however, by no means escaped criticism (see, for example, Dicey, pp. 73 and 721; and an article in vol. 56 of the Law Quarterly Review (1940), pp. 333 to 335, by Mr. Morris and Dr. Cheshire). Had it been necessary to decide the point on the present appeal (which it is not), we should have been disposed to hold that the principle of renvoi finds no place in the field of contract; and accordingly that if the parties to the lease here in question ought to be treated as having accepted Cuban law as the proper law of the contract, such law was the domestic law of Cuba and not the rules of the conflict of laws administered by the Cuban courts.

A good deal of evidence at the trial, and considerable argument before us, was devoted to the question whether under Cuban law the rolling stock, while in use on the railway, was to be considered as real property or personal property. In the view which we take, this question is of no great relevance, but in case we are wrong as to that, we think it proper to set out the conclusions at which we have arrived. The judge stated: "Mr. Megaw put "forward this question as being relevant on three points: first, "as helping to establish that the liabilities of the company in "regard to the lease are liabilities situate in Cuba for the purposes "of clause fourth (B) of the preliminary agreement: secondly, "as a factor to be taken into account in determining the proper "law of the lease: and, thirdly, for the purpose of throwing light "on the question whether or not under Cuban law there had been "an effective transfer of the ownership of the rolling stock to the "trustee."

It appears to us that with regard to the first two points it

[21] [1939] A.C. 277, 292.

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matters not whether the rolling stock did or did not have the character of real property. The essential fact was that it was at all material times physically situated in Cuba. With regard to the third point, for reasons which will appear hereafter, we are satisfied that the trust agreement was effective to transfer the ownership of the rolling stock to the trustee, and our conclusion on this point would be the same whether or not, at the time of the agreement, the rolling stock had the character of real property.

It was contended by Mr. Megaw, and not challenged by Mr. Wilberforce, that in order to determine whether the rolling stock was real or personal property it is necessary to look to the domestic law of the place where it was situated, that is, Cuba. [His Lordship reviewed the evidence on this point and continued:] On this point, therefore, if it is of any relevance, our conclusion is in favour of the trustee. At all material times after April 10, 1921, the rolling stock must in our judgment be regarded as having, under Cuban law, the character of personal property.

As relevant to the issues of conversion and breach of contract which we consider hereafter, the appellants submitted that, whatever may have been the intention of the parties to the trust agreement and their subsequent belief as to its effect, that document was wholly ineffective to pass any title at all in the railway equipment from the rolling stock company to the trustee. The appellants admit that by virtue of the trust agreement the trustee became entitled to the benefit of the railway company's covenants in the lease but deny that they acquired any title to the rolling stock itself. [His Lordship having considered the evidence of Cuban law on this point, concluded that the trust agreement was valid in Cuban law to pass the rolling stock company's title in the rolling stock to the trustee and continued:] In the light of this conclusion it is now necessary to consider the alternative claims put forward on behalf of the trustee on the basis of conversion and breach of covenant. We approach this question on the footing that, whatever law is applicable, the trustee, by virtue of the trust agreement, obtained a good title to the rolling stock. This could not in our judgment be affected in any way by the subsequent re-sale agreement of April 27, 1922, whereby the rolling stock company purported to sell the rolling stock to the company. From the date of the lease the company must be regarded as remaining in possession of the rolling stock as bailees from the trustee. In such circumstances we entertain no doubt that the transfer of the rolling stock to the Cuban State, in pursuance of the agreement of December 1, 1953, was prima facie an act of conversion. If the lease were to be regarded as still in force it was plainly contrary to the terms thereof. If the lease be regarded as no longer in force after February, 1936, there is still no ground upon which the transfer of the rolling stock could be justified. We accept that in order to be actionable as a tort in this country the act complained of must be an act not justifiable

according to the law of the foreign country where it was done, that is, Cuba: see Dicey, 7th ed., r. 181, at p. 940. But in this connection we accept evidence that the transfer of the rolling stock to the Cuban State was an act unjustifiable under Cuban law.

It was contended by Mr. Megaw, and we accept, that an action for conversion will not lie unless the plaintiff can show an immediate right to possession of the chattels in question. It was argued that in this case the trustee could never, at any material time, obtain possession of the rolling stock, because such rights as he had were at all times subject to the limitations imposed by Military Order No. 34 of 1902, particularly Chapter XV thereof. But in our judgment there is no substance in this argument. The purpose of Chapter XV of the Military Order, as plainly appears from paragraph 1 thereof, was to prevent the interruption of the public services afforded by a railroad which might occur if its equipment were subject to the ordinary processes of execution. It was therefore provided that, in the event of a creditor obtaining judgment against a railroad corporation, the court should appoint a judicial administrator or receiver charged with the duty of temporarily administering the railroad and paying the judgment debt out of the net earnings. It appears to us that this provision of Cuban law has no relevance to the question of the trustee's right to possession. It is, no doubt, true that Cuban domestic law might well interfere, to some extent, with the free exercise of the trustee's right to possession, in the same way as the company's own possession of the rolling stock was subject to the limitations imposed by Cuban law. But this could not in our view affect the rights of the trustee and the company inter se. As against the company the trustee was at all material times immediately entitled to such possession as the company itself had.

A further objection taken by Mr. Megaw was that, assuming the ownership of the rolling stock remained throughout in the trustee, it was, by the express terms of clause twenty-ninth, excluded from the operation of the sale agreement of December 1, 1953. On this argument the rolling stock never was sold to the Cuban State, and consequently, there never was any conversion, the trustee being just as free now to exercise its right to possession as it was before the agreement. In our view this contention is wholly without merit, since one thing which is clear is that the effect of the agreement was de facto to transfer the rolling stock to the Cuban State as part of the consideration for the price of $13,000,000 paid by the State.

Assuming a case of conversion to be made out, as in our judgment it has been, Mr. Megaw next contended that the damages in respect thereof could only be nominal. In our view, there is possibly some force in this contention, and for this reason. One result of the act of conversion complained of was to bring into the hands of the company a fund of $13,000,000 against which the trustee became entitled to assert a claim, as it is in

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effect now doing. It is, therefore, in a better position than it was before December 1, 1953, when, owing to the operation of Military Order No. 34 and to the appointment of the interventor, it had no effective means of enforcing its rights or of obtaining payment of the outstanding debt. It is, however, unnecessary for us to express a concluded opinion about this, for in our view the whole of the protracted discussion as to the measure of damages to which we listened was entirely academic. Assuming, for the sake of argument, that Mr. Wilberforce was well founded in contending that the measure of damages for conversion would be the amount which the company would have had to pay on December 1, 1953, in order to make itself the owner of the rolling stock—that is, the total of the outstanding instalments plus its own expenses to date—it was conceded that the trustee would only be entitled to retain, out of that very considerable sum, such an amount as would be sufficient to discharge the 331 outstanding certificates remaining in its hands and to cover its own expenses. This is the very same amount for which, for reasons hereafter stated, the trustee is, in our judgment, entitled to prove under the first head of its claim. For this purpose it does not matter whether that amount be calculated in accordance with the method adopted by the judge and contended for by Mr. Wilberforce, or in accordance with the alternative method suggested by Mr. Megaw. It follows, therefore, that the addition of a claim for conversion could not in any event affect the total of the amount in respect of which the trustee is entitled to prove.

Much the same considerations apply in our view to the further alternative claim for damages for breach of covenant, which equally appears to us to raise questions of wholly academic interest. It is at least open to doubt whether the covenant relied on, namely, that contained in clause fifth of the lease, could have survived the expiry of the lease in February, 1936. This may depend upon the question whether the proper law of the contract was Pennsylvanian or Cuban. If Cuban law applies, the evidence was that the lease must be regarded as surviving. There was no evidence as to Pennsylvanian law on this subject, and accordingly, if the proper law of the contract was Pennsylvanian, it would be necessary, in the absence of evidence as to the foreign law, to apply English law. No English authority was cited to us to show that the doctrine of holding over applies in the case of a lease of chattels. Mr. Wilberforce, however, referred us to *Wedd* v. *Porter*,[22] which arose out of the lease of a farm, and contended that, on the analogy of that case, the covenant contained in paragraph 5 of the lease should be regarded as continuing in force as a matter of implied contract. If so, there could, in our view, be no room for doubt that the transfer of the rolling stock to the Cuban State by virtue of the agreement of December 1, 1953, would have

[22] [1916] 2 K.B. 91.

constituted a breach of the covenant, seeing that the company thereby parted with the whole of its interest in the rolling stock.

It does not, however, appear to us to be necessary to reach any final conclusion upon this point. Assuming that the covenant in the lease is to be regarded as still in force at December 1, 1953, the breach of it by the transfer of the rolling stock to the Cuban State would not confer any additional right on the trustee. The trustee could no doubt elect whether to sue for breach of covenant or for conversion. But in no event could he have his remedy twice for what was, upon any view, a single actionable wrong. Exactly the same considerations with regard to the measure of damages would, in our judgment, apply whether the trustee's claim be based on breach of covenant or conversion. In neither event would the trustee be entitled to retain out of the damages more than would be sufficient to satisfy the proper claims of the 331 outstanding certificate holders together with its own expenses —the very sum for which, in our judgment, it is entitled to prove under the first head of its claim.

For these reasons the trustee's alternative claims based on conversion and breach of covenant in our judgment add nothing to the case, and need not be further considered.

If the proper law of the contract was Cuban, it becomes necessary to consider the application of Cuban moratorium laws, the effect of which, it is contended, would be to reduce to a very considerable extent the sum in respect of which the trustee is entitled to prove. [His Lordship considered the relevant Cuban law, and upheld the finding of Wynn-Parry J. that under Cuban law the liquidator could not in the present case claim the benefit of the moratorium laws, and continued:]

It remains to consider the question raised as to the quantum of the trustee's proof. Up to August 14, 1930, certificates to the nominal amount of $3,800,000 were duly redeemed, the nominal amount of certificates outstanding being thus reduced to $2,200,000. The company subsequently bought in, pursuant to terms of compromise agreed in June, 1939, of proceedings brought against the company in Maine, U.S.A., further certificates to the nominal amount of $1,869,000 at $147.50 per certificate so that the nominal amount of the certificates left outstanding in the hands of members of the public at the commencement of the winding up was $331,000.

The trustee's proof as lodged made claims under four heads tabulated in paragraph 2 as follows: [His Lordship read the paragraph, and continued:] It clearly appears from paragraph 5 that the claim in paragraph 2 (d) in respect of the $1,867,000 (sic) certificates was made as a precautionary measure, inasmuch as these certificates (which, be it remembered, were bearer documents) had not been physically surrendered to the trustee for cancellation, although the trustee had been advised that all rights under them had in fact been effectively extinguished. The figures in the proof are thrown out to some extent

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for the reason that the nominal value of the certificates ultimately left outstanding was taken as $333,000 instead of $331,000, the purchase by the company after default of the two further certificates (nominal value $2,000) having been overlooked. This has resulted in the total nominal value of the certificates bought in after default being put at $1,867,000 instead of the correct figure of $1,869,000, and in the nominal value of the outstanding certificates being overstated by $2,000 as above, with consequential errors in the calculation of premiums and interest. There is, however, no dispute as to the necessary corrections in the figures as such. The corrected total under paragraph 2 (a) of the proof is $734,971.89 instead of $739,412.81. A discrepancy of $1,000 in the total amount of the eleven unpaid instalments should also be noted. This was due to the fact that the first unpaid instalment was taken as $205,000 whereas it was actually $206,000. This has resulted in the total being understated by $1,000, but nothing of any consequence turns upon this relatively small error.

In paragraph 4 of the proof the liability of the company to the trustee in the sums claimed in paragraph 2 was assigned primarily to the covenant for payment of rentals contained in the lease, but such liability was stated in the alternative to arise by way of damages for breach of the covenant against assignment contained in the lease and in the further alternative by way of damages for conversion of the rolling stock by the company. In either of these alternatives the amount of damages recoverable by the trustee in the winding up would take the place of the rentals due under the lease as the fund available to the trustee for the purpose of satisfying the certificate holders' claims.

As appears from what we have said above, we think that the claim in conversion at all events has been made out but regard both these claims in damages as academic. Clearly the trustee could not recover damages under both heads, and would have to elect between them. It is also clear that on the footing that the trustee has, as we have held, established its right of proof for the rentals due under the lease, proof under that head would preclude the trustee from proving additionally for damages under either of the heads claimed. The trustee would thus, in effect, have to elect between proving under the lease and proving for damages under one or other of the heads claimed.

The liquidators having rejected the trustee's proof under all four heads of paragraph 2, the trustee appealed against such rejection by originating summons dated April 25, 1955. The matter came before Roxburgh J. on December 4, 1956, when the judge dealt only with head 2 (d) of the proof—that is, the claim for £1,480,570 5s. 7d. (a figure which requires correction to accord with the addition to the dollar figure of the two further certificates bought in) in respect of the $1,869,000 certificates bought in by the company after default. The immediate importance from the liquidators' point of view of defeating the appeal as regards the rejection of this head of proof was that if the claim

in respect of the $1,869,000 certificates should be eliminated they would be in a position to show a clear surplus of assets over liabilities out of which an interim distribution could be made.

The material part of Roxburgh J.'s order of December 4, 1956, was in these terms: "And this court being satisfied that having "regard to the said exhibit T.W.39 referred to in the said affidavit "of William Robert Tomkinson and Robin Hereward Bruce "Wright filed November 1, 1956, the holders in due course of the "1,867 equipment trust certificates the denoting numbers whereof "are set forth in the schedule to this order have renounced any "claim to participate in the assets available for distribution in "the winding-up and that such renunciation alone is a sufficient "ground for the rejection of that part of the applicant's said "proof of debt (namely the claim in respect of the sum of "£1,480,570 5s. 7d. claimed in subparagraph (d) of paragraph 2 "of the said proof of debt) which is based upon or measured by "reference to the said 1,867 equipment trust certificates Doth "not think fit to reverse or vary the decision of the respondents "as such liquidators rejecting the said proof of debt so far as the "same relates to the said sum of £1,480,570 5s. 7d. and Doth "make no order on that part of the said originating summons "accordingly."

The remainder of the summons was directed to stand over and was ultimately restored before Wynn-Parry J. who made upon it the order now under appeal. The effect of Roxburgh J.'s order of December 4, 1956, on the question of quantum has been the subject of considerable argument before us.

We should next refer to certain passages in the judgment of Wynn-Parry J. on this aspect of the case. The first passage is [23]: "Paragraph 2"—that should be 2 (*a*)—"of the proof seeks to "quantify the claim of the applicant as trustee in respect of "the last eleven instalments payable under clause First II of the "lease and the premium of 2½ per cent. on their face value and "interest. Paragraph 2 (*b*) quantifies a claim for reasonable "expenses under clause First I (*b*) of the lease. Paragraph 2 (*c*) "deals with a claim for expenses incurred or to be incurred by the "applicant as trustee since March 4, 1954. Paragraph 2 (*d*) "quantifies a claim in respect of the certificates of the face value "of $1,867,000 which had been purchased by the company. I "am not concerned with this claim, because any claim in respect "of these certificates was renounced, and on that basis Roxburgh "J. by an order of December 4, 1956, in effect upheld the rejec-"tion of the proof so far as regards the claim in respect of these "certificates."

The next passage is this [24]: "The amount for which the "trustee is entitled to prove should be ascertained as follows. "There must first be ascertained what is due to the trustee under "the lease. Expressed in dollars this consists of (1) sums due

[23] [1958] Ch. 724, 744.

[24] [1958] Ch. 724, 758, 759.

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"under clause First I (*a*) and First II of the lease, and (2) what "upon inquiry shall be found to be the correct sum in dollars "under paragraph 2 (*b*) and (*c*) of the proof.

"As regards the premium of 2½ per cent. on the face value of "the certificates, this arises under the agreement and not under "the lease and should not taken into account at this stage of the "calculation. Then the dollars must be converted into sterling. "As regard principal, this represents eleven instalments of rental, "and so each instalment should be coverted at the rate of "exchange obtaining when it fell due. As regards the first claim "for interest, this represents interest payable under the lease "and therefore payable half yearly on February 14 and August "14 of each year. Therefore, the total sum claimed under this "head should be broken down into half-yearly amounts and con-"verted at the rate of exchange obtaining on the respective dates "when each half-yearly payment should have been made. The "second claim for interest is really a claim for rent on the basis "of holding over. I think, therefore, that, for purposes of con-"version into sterling, the same method should be adopted as for "the first claim for interest. The sums making up what is found "to be the correct figure under paragraph 2 (*b*) must be con-"verted into sterling at the rate obtaining on the respective dates "of payment, while the sum found due under paragraph (*c*) must "be converted into sterling at the rate obtaining at the com-"mencement of the winding-up, namely, March 4, 1954.

"If, of course, any of the items comprised in subparagraph "(*b*) were incurred in sterling, there will be no need to convert "into dollars and then back to sterling.

"The sum resulting from the above calculation will represent "the sum for which the trustee is entitled to prove in the "liquidation. But, of course, as the trustee is a trustee, it can "only receive in respect of its proof a sum sufficient to satisfy "the proper claims of the certificate holders. In this regard I "think that Mr. Wilberforce is right in his submission that the "principle underlying the decision in *In re Chesterman's Trusts* [25] "applies. I do not see how otherwise to deal with the matter. "The proper course, therefore, is to ascertain the sum in dollars "to which the certificate holders are entitled for principal, out-"standing interest and the premium of 2½ per cent. To that "total must be added the sums found due under subparagraphs "(*b*) and (*c*) of paragraph 2 of the proof. Then there must be "ascertained the amount of sterling which would have been "required at the date of the liquidation to purchase the aggregate "amount of dollars so ascertained. This total will represent the "maximum amount which the trustee on behalf of the certificate "holders can receive in respect of the sum proved for. How "much the trustee will in fact receive will depend on the dividend "payable in respect of the sum proved for."

[25] [1923] 2 Ch. 466.

By the order under appeal the judge directed three inquiries as to the amount of the trustee's expenses, the first and second being concerned with expenses incurred down to March 4, 1954 (i.e., the date of the commencement of the winding-up), the first not to be proceeded with in the event of the trustee electing to base its proof on the claims for damages. These inquiries appear to differ from each other only in the respect that the first directs conversion into sterling as on the respective dates on which the expenses were incurred, while the record directs conversion into sterling as on March 4, 1954, a maximum of £11,177 6s. 9d., the amount claimed in the proof being set in both cases. The third inquiry relates to the amount of the trustee's future or contingent claim for expenses subsequent to March 4, 1954, and directs conversion into sterling as on that date.

We do not think we need refer in any greater detail as to the terms of these inquiries; but it should be mentioned that the notice of appeal takes the point that in the event of the trustee electing to prove on the basis of damages for conversion or breach of covenant, it was not entitled to claim or receive anything in respect of expenses after December 1, 1953, and that inquiry No. 2 should accordingly be omitted.

In view of Mr. Megaw's argument, the material part of the rest of the order should, we think, be referred to at length. It proceeds as follows: the material part is in these terms:

"And this court doth declare that the provable sum ought to "be computed in manner following:—

"(1) There shall first be computed either:—

"(A) The sterling equivalent of the following amounts "of dollars of the United States of America at the respective "rates of exchange current on the following dates that is to say "206,000 on the 14th day of February, 1931, 205,000 on each "14th day of February and 14th day of August from and "including the 14th day of August, 1931, down to and including "the 14th day of February, 1936, 82,500 on each 14th day of "February and 14th day of August from and including the 14th "day of February, 1935, down to and including the 14th day of "February, 1954, and 8,136.99 on the 4th day of March, 1954, "together with either the amount agreed or found on the making "of the inquiry first hereinbefore directed or the sum of "£11,177 6s. 9d., whichever is the less and together with the "amount agreed or found on the making of the inquiry thirdly "hereinbefore directed; or if the applicant shall so elect

"(B) The sterling equivalent at the rate of exchange current "on the 1st day of December, 1953, of 2,000,0000 dollars of the "United States of America being the maximum amount recover-"able by way of damages for conversion of the property com-"prised in the said lease and being also the amount recoverable "by way of damages for breach of the covenant against assign-"ment in the said lease contained

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"(2) From the amount so computed under (A) or (B) as the "applicant shall have elected there shall be deducted the amount "if any by which the same exceeds the aggregate of the following "three amounts namely (a) the amount of sterling which would "have been required on the 4th day of March, 1954, to purchase "734,971.89 dollars of the United States of America (b) the "amount agreed or found on the making of the inquiry secondly "hereinbefore directed or the sum of £11,177 6s. 9d., whichever "is the less and (c) the amount agreed or found on the making of "the inquiry thirdly hereinbefore directed; and the amount so "computed after such deduction (if any) as aforesaid shall be the "provable sum but so that any interim distribution in respect of "the first of the said three amounts shall not be delayed by "reason only that the second and third of the said three amounts "or either of them shall remain to be agreed or found as afore-"said." That I think is the material part of the order.

It will be seen that by paragraph (1) (A) the judge has directed the computation of the total amount in sterling represented (a) by the 11 unpaid capital instalments (viz. $2,256,000); (b) by interest at the contractual rate from the date of default down to the date of the commencement of the winding-up on the $2,200,000 certificates outstanding at the date of default; (c) by the amount agreed or found for the trustee's expenses prior to that date on making the first inquiry, or the amount (i.e., £11,177 6s. 9d.) proved for under this head, whichever was the less; and (d) by the amount agreed or found for the trustee's prospective remuneration on making the third inquiry; the sterling equivalent of the sums representing instalments of principal and interest to be ascertained by converting them into sterling as on the dates when they respectively fell due, and the sterling equivalent of the sums representing the trustee's expenses to be calculated in accordance with the terms of inquiries Nos. 1 and 3 respectively.

It will further be seen that the judge has next proceeded by paragraph 1 (B) of the order to direct the alternative computation at the option of the trustee of the sterling equivalent the rate of exchange current on December 1, 1953 (i.e., the date of the sale to the Cuban State, being the date of the conversion or breach of covenant charged by the trustee) of $2,000,000 described as the maximum amount recoverable as damages for conversion and also the amount recoverable as damages for breach of the covenant against assignment.

Having thus provided for the ascertainment of (a), the total amount in sterling due from the company to the trustee at the commencement of the winding-up, measured simply by reference to the terms of the covenant for payment of rentals, or, alternatively, (b) the amount in sterling of the damages recoverable by the trustee for conversion or breach of covenant fixed in the first instance simply by reference to the value of the rolling stock at the date of the conversion or breach, the judge proceeds in

paragraph 2 to limit for the purposes of proof the sum ascertained under (1) (A) or (1) (B), as the case may be, to the aggregate sum required to satisfy in full the claims of the holders of the outstanding certificates for principal, premium and interest (put at $734,971.89) plus the amount of the trustee's expenses (past or prospective) as agreed or found on the making of inquiries Nos. 2 and 3 (with a maximum as regards inquiry No. 2 of £11,177 6s. 9d., being the amount claimed in the proof), by deducting from the sum ascertained under (A) or (B), as the case may be, the amount (if any) whereby the sum so ascertained exceeds the aforesaid aggregate sum.

For the purpose of ascertaining the amount of this deduction, the $734,971.89 representing the principal, interest and premium due on the 331 outstanding certificates is directed by the order to be converted into sterling as on March 4, 1954, and not on the respective dates on which the payments in question respectively fell due.

Similarly, in the relatively small matter of the trustee's expenses, the sum agreed or found on the making of inquiry No. 2 (which postulates conversion into sterling as on March 4, 1954) is adopted in either alternative as opposed to the amount agreed or found on the making of inquiry No. 1, which postulates conversion into sterling as on the respective dates on which the expenses in question were incurred.

The principles adopted by the judge in quantifying the provable sum thus appear to have been these:

(i) The creditor of the company in this matter is the trustee, as distinct from the holders of the outstanding certificates, who are cestuis que trustent, not entitled to claim against the company as creditors, but entitled, as between themselves and the trustee, to have their claim for principal, premium and interest satisfied out of any moneys recovered by the trustee from the company in its capacity as trustee for the certificate holders.

(ii) The first step must, therefore, be to calculate the amount due to the trustee according to the terms of the lease, or as the case may be, by way of damages for conversion or breach of covenant as if the trustee was beneficially entitled to the amount so due. For the purposes of this calculation the amounts found due to the trustee under the lease must be converted into sterling at the rate of exchange obtaining on the respective dates on which they fell due, and on the alternative basis of proof, the damages found due to the trustee must be converted into sterling at the rate of exchange obtaining at the date of the conversion or breach of covenant.

(iii) The trustee cannot, however, prove for the full amount so calculated, but, being a trustee, must limit its proof to the amount required to meet in full the claims of its cestuis que trustent, or, in other words, the holders of the outstanding certificates and the trustee's own claim for expenses. It is thus

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necessary to calculate what is due to the holders of the outstanding certificates for principal, premium and interest, or, in other words, what they would be entitled to receive out of the fund calculated as in (ii) above, if that fund was actually in the hands of the trustee and available for distribution at the date of the commencement of the winding up. For the purposes of this calculation the amount in dollars found due to the holders of the outstanding certificates must be converted into sterling as on the date of the winding up, and this also applies to the trustee's own claim against the fund for its expenses.

(iv) The trustee is thus entitled to prove for the sterling equivalent of the amount in dollars representing the principal, premium and interest due on the outstanding certificates and its own expenses at the rate of exchange obtaining at the date of the commencement of the winding up.

The contest between the parties on this aspect of the case is mainly concerned with the rate of exchange to be adopted for the purpose of converting from dollars into sterling the amounts payable to the certificate holders out of the rentals for which the trustee is entitled to prove.

Mr. Megaw accepts the figure $734,971·89 given in Wynn-Parry J.'s order, which is in fact the amount claimed in paragraph 2 (*a*) of the proof, adjusted as above mentioned, as a correct calculation of the sum in dollars for the sterling equivalent of which the truste is entitled to prove in respect of the principal, premium and interest due on the 331 outstanding certificates. But he says that the sum in dollars should be converted into sterling at the rates of exchange prevailing on the respective dates on which the instalments comprised in it fell due, and not as claimed in the proof and held by Wynn-Parry J. at the rate of exchange prevailing at the date of the commencement of the winding-up. The difference here is substantial, as the sterling equivalent on Mr. Megaw's view is £180,724 5s. 1d. as compared with the £264,076 0s. 1d. claimed in the proof.

So far as this court is concerned, it cannot be disputed, that as between the company and the trustee the proper rate of exchange for the purpose of ascertaining the sterling equivalent of the instalments due under the lease is the rate of exchange prevailing at the date when each instalment fell due. (See *In re Russian Commercial and Industrial Bank*[26] and the authorities there cited.) We should, however, note that Mr. Wilberforce told us that he wished to keep the point open in case the matter went higher.

Mr. Megaw says the same rule applies to the sums in respect of principal, premium and interest due to the holders of outstanding certificates by reference to which the trustee's claim in respect of the instalments due under the lease must be limited for the purposes of his proof. As we understood him, he

[26] [1955] Ch. 148; [1955] 1 All E.R. 75.

contended that the company's only liability to the trustee, so far as the proof was based on the lease, was for rentals and nothing else. The trustee rightly quantified its proof for rentals by reference to the amounts due for principal, premium and interest under the outstanding certificates, but the amounts proved for did not lose their essential character as rentals because they had been so quantified, and, accordingly, should be treated as rentals and converted into sterling as on the respective dates when the instalments of which they were composed fell due.

We do not think this argument accords with the true legal position. The trustee is a creditor of the company for the total amount of the unpaid instalments under the lease, which, through the medium of the trust for the certificate holders, constitute the security for the due payment of the principal, premium and interest to which such holders are entitled under the trust agreement.

The amount due from the company to the trustee under the lease (save as regards interest) does not depend on the number of certificates for the time being outstanding, though the trustee cannot claim to retain out of the amount due to him anything more than the total sum required for payment in full of the principal, premium and interest due on the outstanding certificates together with the trustee's own expenses.

It is accordingly right to limit the trustee's proof to that total amount. But on the assumption that the company is solvent, which we understand to be the case, one must, for the purpose of working out the rights of the parties, treat the company as having in the first instance paid over to the trustee the full amount due to the trustee under the lease.

The trustee must then be regarded as bound to apply the fund so provided in paying in full the total amount due for principal, premium and interest on the certificates, together with the trustee's expenses, and to repay the surplus to the company. Once the total amount due on the outstanding certificates and for the trustee's expenses has been ascertained in this way, the trustee's proof may properly be presented as a proof for the rentals due under the lease up to that total amount, but the fact must not be lost sight of that, so far as the holders of the outstanding certificates are concerned, their claim is not for rentals due to them from the company but for payment by the trustee out of the trust fund notionally constituted by the rentals due from the company to the trustee of the full amount of their principal money, premium and interest. The fact that the rentals due from the company to the trustee are to be converted into sterling at the rates prevailing on the dates on which they are respectively due, as opposed to the rate prevailing on the date of the commencement of the winding up, March 4, 1954, reduces the amount in sterling notionally receivable by the trustee from the company. But it does not follow that this reduction must lead to a corresponding scaling down of the amounts payable to the

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holders of the outstanding certificates. Their right is to be paid in full out of the fund recovered by the trustee on their behalf so far as the money will go. Thus the rate of exchange appropriate to the quantification of the certificate holders' claims is not determined by the rate appropriate to the quantification of the sums due to the trustee under the lease, but must depend on the nature of those claims.

As to that, it is to be once more observed that the certificate holders are not creditors either of the company or of the trustee. Their only right is a right to call upon the trustee to execute its trust to the extent of any moneys from time to time received by the trustee for that purpose. Their right to receive from the trustee the amounts of their claims in dollars cannot, therefore, be said to have arisen on any earlier date than the date of the commencement of the winding up. Nor is it possible to relate the claim under any particular certificate to any particular instalment date under the lease.

As we understand it, the principle underlying the rule that conversion into sterling of an unpaid debt in foreign currency should be effected on the date when the debt became due is that a contract to pay a sum in foreign currency is equivalent to a contract to deliver a chattel, and that failure to deliver it on the due date constitutes a breach of contract for which damages must be assessed at the time of the breach. Thus the amount in sterling of the damages suffered through the debtor's failure to pay or deliver the foreign currency on the due date, assessed at the date of the breach, is the price in sterling as at the date of the breach of the sum in foreign currency which the debtor had promised to pay.

This principle has no application in the present case so far as the claim of the certificate holders is concerned, since they claim as cestuis que trustent and not as creditors.

Mr. Megaw raised a further argument based on Roxburgh J.'s affirmation of the rejection of the trustee's proof under paragraph 2 (*d*). It will be remembered that this order was to the effect that the court being satisfied that the holders in due course of the 1,867 (or 1,869, adjusted) certificates had renounced any claim to participate in the assets available for distribution, and that such renunciation alone was a sufficient ground for the rejection of that part of the proof of debt, namely, the claim in respect of the sum of £1,480,570 5s. 7d. (the figure appropriate to 1,867 certificates) claimed in paragraph 2 (*d*) of the proof, which was based on or measured by reference to the said 1,867 (or 1,869) certificates, did not think fit to reverse or vary the liquidator's rejection of that part of the proof.

Mr. Megaw complained that Wynn-Parry J.'s order was inconsistent with that of Roxburgh J. He said that the upshot of Roxburgh J.'s order was that the trustee, having proved in respect of $2,200,000 certificates under paragraph 2 (*d*), and having had its proof of debt rejected as regards $1,869,000 of them, was now

being allowed to formulate its claim in respect of the remaining $331,000 certificates by reference to the amount for which the trustee would have been entitled to prove in respect of rentals if the 1,869 certificates had in fact been outstanding as well as the 331, in which case the total number of certificates outstanding would have been 2,200.

He says that, having regard to Roxburgh J.'s order, the proper course would have been not merely to disregard the 1,869 certificates, while treating the proportion of the instalments appropriate to the satisfaction of the claims in respect of them, if such claims had been allowed as available to meet the claims of the holders of the 331 certificates, but to treat that proportion of the instalments as irrecoverable. On this basis, he says, the proper course would have been to take 331 2,200th parts only of the total amount of the instalments as the sum available to meet the claims under the 331 outstanding certificates, eliminating the remaining 1,869 2,200th parts as attributable exclusively to the 1,869 certificates the Trustee's proof in respect of which has been rejected. He pointed out that the sums proved for in respect of principal and premium due to the holders of the 331 and the 1,869 certificates respectively under paragraph 2 (*a*) and (*d*) amounted together to $2,255,000, or only $1,000 less than the total amount of the eleven unpaid capital instalments, the differences being accounted for in the way already explained. Consequently, he said, the sums in dollars for which the trustee could prove in respect of the 331 certificates must, like the instalments under the lease, be converted into sterling at the rates of exchange prevailing on the dates when the instalments comprised in them respectively fell due; for if they were converted at the rate of exchange prevailing at the date of the commencement of the winding up, they could only be satisfied by trenching upon the proportion of the instalments attributable to the 1,869 certificates, which would be inconsistent with Roxburgh J.'s order.

We think there is a fallacy here. The rejection of the proof in respect of the 1,869 certificates meant that no claim could be made in respect of them. It did not mean that the rentals applicable in satisfying the claims of the holders of the outstanding 331 certificates were to be reduced by deducting the proportion of them (1,869 2,200ths) attributable to the 1,869 certificates. The capital instalments under the lease continued to be payable irrespective of the number of certificates which might for the time being be outstanding. The redemption or buying-in of certificates, or, we might add, the renunciation of all claims under any given certificates merely had the effect of improving the security of the certificates left outstanding. The whole fund constituted by the rentals due remained available to satisfy the claims of the 331 certificates in fact outstanding up to the amount required to pay principal, premium and interest in full.

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Mr. Megaw's submission comes near to treating the 1,869 certificates as having been kept on foot for the benefit of the company, which surely cannot be right. Accordingly, we reject this argument. Mr. Megaw did not develop his argument on this part of the case with reference to the alternative claims for damages, but we understand his submission there to be that by parity of reasoning the trustee's claim should be limited to 331 2,200ths of any damages allowed.

In deciding that the amounts due to the holders of the outstanding certificates should be converted into sterling at the rate of exchange prevailing at the date of the commencement of the winding up, Wynn-Parry J. accepted Mr. Wilberforce's submission that the principle underlying *In re Chesterman's Trusts* [27] applied. That submission was repeated before us and we agree with the judge's acceptance of it.

For the reasons we have stated, we are of opinion that the judge came to a right conclusion on all the material questions in this case and accordingly that this appeal fails and should be dismissed.

Willmer L.J. I wish to make it clear that I concur in, and share the responsibility for, the judgment which has just been delivered, except with regard to two points upon which I have the misfortune to differ from my brethren. I need hardly say that only with some hesitation and diffidence do I venture to express a conflicting view, especially as my view is also in conflict with that of the trial judge.

The first point upon which I differ from my brethren and from the trial judge is with regard to the proper law of the contract. I can find no satisfactory reason for applying Pennsylvanian law. For reasons which I will attempt to state as briefly as possible, I have arrived at the conclusion that the proper law of the contract was that of the Republic of Cuba.

Since we have held that even applying Cuban law the appellants must fail on their plea of statutory novation, as also in their reliance upon the Cuban moratorium laws, it is obvious that the issue as to the proper law of the contract has become one of only academic interest. But as the matter has been very fully argued, and in case it should hereafter be thought to be of any relevance, I think it only right to state my conclusion and the reasons which have impelled me to it.

The principles to be applied in determining what is the proper law of the contract have already been stated by my Lord in the judgment which has just been delivered. I do not disagree, nor do I think there is any room for disagreement, as to the principles to be applied.

They are succinctly summed up in the words of Viscount

[27] [1923] 2 Ch. 466.

Simonds, in the passage already quoted, to the effect that the proper law is the one "with which the transaction has its closest "and most real connection." It is by my attempt to apply those principles to the particular facts of this case that I, for my part, have been led to the conclusion that the proper law of this contract, i.e., of the lease agreement, was Cuban.

[His Lordship then referred in detail to the wording of the documents which led him to this conclusion and continued:] For these reasons, although I do not think it is of any materiality in view of our decision on other aspects of the case, I am disposed to accept the contention put forward on behalf of the appellants that, so far as the lease is concerned, Cuban law was the proper law of the contract. It remains for me to add that I am fully in agreement with my Lords that the principle of renvoi finds no place in the field of contract. I share with them the view that, if Cuban law were to be regarded as the proper law of the contract, such law would be the domestic law of Cuba, and not Cuban private international law.

The other point upon which I have the misfortune to disagree is with regard to the quantum in respect of which the trustee is entitled to prove. This seems to me to raise questions of very grave difficulty, and in order to appreciate the questions involved it is necessary to refer briefly to the history of what occurred.

By clause First I of the lease agreement the company was liable to pay interest half-yearly at the rate of $3\frac{3}{4}$ per cent. on all outstanding certificates up to and including February 14, 1936. By clause First II the company was liable to pay half-yearly instalments in respect of capital at the rate of $206,000 up to and including February 14, 1931, and thereafter at the rate of $205,000 up to and including February 14, 1936. Prior to February 14, 1931, the company redeemed certificates to the face value of $3,800,000, leaving $2,200,000 then outstanding. It defaulted in paying the instalments of $206,000 due on February 14, 1931, and all subsequent instalments. It thus defaulted in respect of the last eleven instalments of capital, to a total amount of $2,256,000. It continued to pay interest up to and including August 14, 1934, but thereafter it defaulted in respect of all interest payments due. By February 14, 1936, the total of the default in respect of capital instalments and interest had reached $2,503,500. No interest has been paid since February 14, 1936, and the trustee has included a claim for interest at the rate of 6 per cent. per annum from that date to the date of the liquidation, that is to say, March 4, 1954. It has not been suggested to us that 6 per cent. per annum was other than a proper rate of interest to charge in respect of this period. The effect of this interest was to increase the total indebtedness outstanding at the date of the liquidation to $4,886,009.59.

In 1937 certain proceedings were instituted by the trustee against the company in the Superior Court of the State of Maine

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in the United States of America. It is unnecessary to refer to the details of those proceedings: it is sufficient to record that they were ultimately compromised on the terms, inter alia, of an offer by the company to purchase outstanding certificates at a price of $147.50 per certificate. This led to the company purchasing a number of the outstanding certificates, and by the time of the liquidation a total of 1,869 certificates had been purchased by the company, leaving only 331 certificates outstanding in the hands of the public. The 1,869 certificates purchased by the company were never presented for retirement, but remained in the hands of the company until the date of the sale to the Cuban State. These certificates, in accordance with paragraph (D) of annex A (I) to the preliminary agreement of September 5, 1953, were transferred to the Cuban State together with all the rest of the company's assets in Cuba. They were then, in turn, transferred by the Cuban State to the new company, Occidentales.

The claim of the trustee is set out under four headings in paragraph 2 of the proof of debt filed on his behalf. Under sub-paragraph (*a*) a claim is made in respect of 333 certificates, said to be then outstanding in the hands of the public. It is common ground that the number of certificates then outstanding was in fact 331, and that the figures of the claim must be adjusted accordingly. The amount claimed under this sub-paragraph is a sum made up of (i) the face value of the certificates, (ii) premium of 2½ per cent. on such face value, (iii) interest at 7½ per cent. per annum on such face value from August 15, 1934, to February 14, 1936, and (iv) interest at 6 per cent. per annum on such face value from February 15, 1936, to March 4, 1954. The total as originally claimed under this heading was $739,412.81, but after adjusting this figure for 331 certificates instead of 333 the total should be $734,971.89.

Under subparagraph (*d*) a precisely similar claim, made up of face value, premium and interest, is put forward in respect of the certificates purchased by the company—said to be 1,867, but in fact, 1,869, certificates. The total under this heading, as originally claimed, was $4,145,596.78, but the adjusted figure should be $4,150,037.69.

Subparagraph (*b*) contains a claim for expenses incurred by the trustee in the performance of the trust up to the date of the liquidation, and in subparagraph (*c*) there is a claim for estimated expenses incurred or to be incurred subsequent to the date of the liquidation. So far as this appeal is concerned, nothing turns on the claims put forward in subparagraphs (*b*) and (*c*).

Subject to one small discrepancy, the total of the amounts claimed under subparagraphs (*a*) and (*d*) is the same as the total of the company's outstanding indebtedness at the date of the liquidation as set out above; and the sum of the first two items in these two subparagraphs is equivalent to the total of eleven

instalments outstanding under clause First II of the lease agreement. In each case there is a discrepancy of $1,000, which is attributable to the fact that the unpaid instalment, due on February 14, 1931, was one of $206,000, whereas the sums set out in subparagraphs (*a*) and (*d*) correspond in amount with instalments at the rate of $205,000 throughout.

The sums in dollars claimed in the various subparagraphs of paragraph 2 of the proof of debt are converted into sterling at a uniform rate of $2.80 to the pound, and it is this circumstance which has given rise to dispute between the parties.

But, to continue with the history of the matter, in December, 1956, the liquidators applied to the court for leave to make an interim distribution. For the purpose of enabling the court to arrive at any decision about this it was necessary to consider what the amount of the company's liability in respect of the outstanding certificates was likely to be.

If the trustee was to be entitled to claim in respect of all the 2,200 certificates outstanding, it was clear that insufficient funds would be available in the hands of the liquidators to justify any interim distribution. But if the trustee's claim could be confined to the 331 certificates remaining outstanding in the hands of the public, it was considered that some interim distribution would be justifiable. The application to the court was supported by an affidavit sworn by the liquidators, which proved the purchase of 1,869 certificates by the company, and the fact that those certificates were handed to the Cuban Government on completion of the sale of the company's undertaking, and were subsequently delivered by the Cuban Government to the new company, Ferrocarriles Occidentales. It was also provided: (a) that these 1,869 certificates were deposited with the National Bank of Cuba with an instruction from Ferrocarriles Occidentales that they were not to be withdrawn without the authority in writing of the Minister of Finance of Cuba; (b) that such certificates had been stamped "Not transferable"; and (c) that the Cuban Government had stated that no claim had been or would be made by the Cuban State against the company or against the trustee in respect of these certificates.

The application came before Roxburgh J. who made an order dated December 4, 1956, which has been placed before us. The order recites that the court was satisfied that the holders in due course of the certificates (wrongly stated to number 1,867) had renounced any claim to participate in the assets available for distribution in the winding up and that such renunciation alone was a sufficient ground for the rejection of that part of the trustee's proof of debt—namely, the claim contained in paragraph 2 (*d*) thereof—which was based on or measured by reference to the 1,867 certificates. The court accordingly did not think fit to reverse or vary the decision of the liquidators rejecting the proof of debt in so far as it related to the claim contained in paragraph 2 (*d*).

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Having regard to this decision the trustee has not in fact sought to proceed further with any claim in respect of the 1,869 certificates purchased by the company, which formed the subject-matter of paragraph 2 (*d*), and in these proceedings he has limited himself to the claims set out in subparagraphs (*a*), (*b*) and (*c*). So far as the claims under subparagraphs (*b*) and (*c*) are concerned, Wynn-Parry J. directed certain inquiries as to the expenses there claimed. No argument has been addressed to us with regard to this part of the judge's order, nor has any question been raised before us with regard to the rate of exchange applicable to any claim for expenses under these two subparagraphs. The problem which has arisen has been with regard to the method of computation to be adopted in order to quantify in sterling the claims of the trustee under subparagraph (*a*).

Wynn-Parry J. directed that the amount for which the trustee is entitled to prove should be ascertained as follows: In the first place it must be ascertained what in dollars was due to the trustee in respect of interest under clause First I (a) of the lease, and in respect of capital instalments due under clause First II. This would represent the liability of the company at the date of the termination of the lease, that is February 14, 1936. The claim for further interest subsequent to that date he treated as in effect a claim for rent on the basis of holding over. The judge directed that, for the purpose of converting the total of the sums so ascertained into sterling, each payment due, whether of interest or of capital instalment, should be converted at the rate of exchange prevailing upon the date when it was due. He held that any sums due for expenses under paragraph 2 (*b*) should be converted into sterling at the rates prevailing on the respective dates of payment; and any amount found due for expenses under paragraph 2 (*c*) should be converted at the rate prevailing at the commencement of the winding up. The resulting sum in sterling would, in the judge's view, represent the amount for which the trustee would be entitled to prove in the liquidation. Pausing there, it will be seen that this sum would represent the sterling equivalent of the whole of the sums in dollars claimed under subparagraphs (*a*), (*b*), (*c*) and (*d*), that is, a total of nearly five million dollars.

The judge, however, then went on to point out that, being a trustee, the trustee would only be entitled to receive in respect of its proof such a sum in sterling as would be sufficient to satisfy the proper claims of the certificate holders, which means in this context the claims of the holders of the 331 certificates, with the addition of such a sum as might be found due for expenses under subparagraphs (*b*) and (*c*) of paragraph 2 of the proof. As to the claims of the certificate holders he held that the principle of *In re Chesterman's Trusts*[28] applied. Applying this principle he

[28] [1923] 2 Ch. 466.

directed that the sum in dollars must be ascertained to which the 331 certificate holders are entitled, under the terms of the trust agreement, in respect of principal, outstanding interest and premium of 2½ per cent. This sum, when ascertained, he held should be converted into sterling at the rate prevailing at the date of the liquidation, and the resulting amount in sterling would represent the maximum that the trustee, on behalf of the certificate holders, would be entitled actually to receive in respect of the sum proved for.

This method of computation involves that, although for the purpose of ascertaining in sterling the total of the capital instalments and interest in default the conversion was to be at the rates of exchange prevailing on the dates when the various payments ought to have been made (in most cases approximately 5 dollars to the £), the holders of the 331 certificates would be entitled to claim, out of the total so ascertained, a sum in sterling sufficient to purchase the dollars attributable to their share at the rate of exchange prevailing at the date of the liquidation (that is, substantially 2.80 dollars to the £).

This, Mr. Megaw argued, could not possibly be justified, for it would result in the 331 certificate holders being able to claim for too large a slice of the available cake. His argument may be summarised as follows. The method of computation adopted by the judge is inconsistent with the order made by Roxburgh J., the effect of which was to uphold once and for all the liquidator's rejection of the proof in so far as it was based upon or measured by reference to the 1,869 certificates purchased by the company. It follows that the trustee is only entitled to claim for such proportion of the company's total indebtedness as is attributable to the 331 certificates remaining in the hands of the public. It is therefore wrong to allow the trustee to prove for the whole of what is due in respect of all 2,200 outstanding certificates, and to retain out of the proceeds enough sterling to pay off the 331 certificate holders in dollars purchased at the rate of 2.80 dollars to the £. On the contrary, the total indebtedness of the company in dollars having quite properly been converted into sterling at the rates of exchange appropriate on the dates when the various payments were due, the trustee is only entitled to claim, on behalf of the 331 certificate holders, such proportionate part of the sum in sterling so ascertained as is attributable to the 331 certificates—that is, 331/2,200ths of the sterling sum.

In order to illustrate his argument Mr. Megaw prepared and placed before us a revised calculation showing in detail what the result would be—that is, what the sterling liability of the company attributable to the 331 certificate holders would be if his argument were accepted. This calculation results in a figure of £180,724 5s. 1d. in respect of paragraph 2 (*a*) of the proof, instead of the sum of £264,076 0s. 1d. as therein claimed. Mr. Wilberforce, on the other hand, strenuously defended the order made

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by the judge, and contended that the method adopted by him was the correct method of computation in the circumstances of this case. But, in spite of Mr. Wilberforce's attractive argument to the contrary, I am unable to see any logical answer to Mr. Megaw's contention.

The argument may be tested by considering what would be the position if the whole of the 2,200 outstanding certificates were in the hands of the public. In such circumstances the trustee would be entitled to prove for the whole of the sums in dollars set out in sub-paragraphs (*a*) and (*d*) of paragraph 2 of the proof, converted into sterling at the rates of exchange prevailing on the dates when the amounts, whether of capital instalments or of interest, were due. As trustee, it would then have to account to all the certificate holders in equal shares, so that each certificate holder would be entitled to 1/2,200th part of the sterling sum so ascertained. Here the trustee is claiming on behalf of 331 certificate holders, and I do not see how he is entitled to claim on their behalf more than 331/2,200th parts of the sterling sum. If the 331 certificate holders were entitled to have their dollar claims converted into sterling at the current rate of exchange, they would be put in a privileged position as compared with the notional holders of the remaining 1,869 certificates.

Putting the matter in another way, if the trustee were able to put its hands on the whole of the sum representing the sterling indebtedness of the company, it would, as I see it, have to account to the company (or to the Cuban State) for the proportion attributable to the 1,869 shares, in the same way and to the same extent as to the 331 certificate holders for the proportion attributable to their share. The notional cake is only a certain size, and each certificate holder is entitled to 1/2,200th part of it. Paragraph 2 (*a*) of the proof represents the trustee's claim in respect of its liability to the 331 certificate holders: paragraph 2 (*d*) represented its claim in respect of what would have been its liability in respect of the remaining 1,869 certificates if they had not been purchased by the company. The two added together represent the total indebtedness of the company in respect of capital instalments and interest due but unpaid. The sterling equivalent of that indebtedness must be calculated having regard to the rates of exchange prevailing on the dates when the respective payments ought to have been made. Having regard to the order made by Roxburgh J. no claim can now be made in respect of so much of the total as is attributable to the 1,869 certificates. The trustee's claim under paragraph 2 (*a*) must, therefore, in my judgment, be limited to 331/2,200th parts of the total as so ascertained.

I would, therefore, allow the appeal to the extent of reducing the trustee's claim under paragraph 2 (*a*) of the proof to a sum calculated in accordance with Mr. Megaw's submission, and I

would have been disposed to direct an inquiry as to the actual figures, if these could not be agreed. Since, however, my brethren take a different view, the order to be made must be as directed by them.

Appeal dismissed.
Leave to appeal.

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Solicitors: *Norton, Rose & Co.; Herbert Smith & Co.*

J. A. G.

[COURT OF APPEAL.]

In re WESTMINSTER'S DEED OF APPOINTMENT. KERR AND OTHERS *v.* WESTMINSTER.

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Jan. 27, 28.
Lord Evershed M.R., Romer and Ormerod L.JJ.

[1956 W. No. 1352.]

Revenue—Income tax—"Free of tax" payments—Provision made before September 3, 1939*—Covenant to pay annuity after death of husband in marriage settlement made before September* 3, 1939*—Death of husband in* 1953*—"Provision"—When "made"—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 486.
Statute—Construction—Mischief intended to remedy—Uncontemplated taxation—Income Tax Act, 1952, *s.* 486.

By deed of February 19, 1930, made in consideration of his marriage with the defendant, W., in exercise of the powers vested in him by a resettlement of 1901, irrevocably appointed by way of jointure to the defendant during her life a rentcharge of £6,000 to commence from his death to issue out of the settled hereditaments; and he further covenanted with the defendant that if the then intended marriage was solemnised, and if the defendant survived him, that his executors and administrators would during her life pay to the defendant such yearly sum as with the jointure rentcharge would, after deduction of all income tax and surtax, leave the net yearly sum of £6,000. The marriage between W. and the defendant was solemnised the next day. W. died in 1953. Danckwerts J. held that section 486 of the Income Tax Act, 1952,[1] did not apply, and that the defendant was entitled to be paid £6,000 free of income tax and surtax:—

[1] Income Tax Act, 1952, s. 486 (1): "Subject to the provisions of "this section, any provision, however "worded, for the payment, whether "periodically or otherwise, of a stated "amount free of income tax, or free "of income tax other than surtax, "being a provision which—(*a*) is "contained in any deed or other "instrument, in any will or codicil, "in any order of any court, in any "local or personal Act, or in any "contract, whether oral or in writing; "and (*b*) was made before September "3, 1939; and (*c*) has not been varied "on or after that date, shall, as "respects payments falling to be "made during any year of assess-"ment the standard rate of income "tax for which exceeds five shillings "and sixpence in the pound, have "effect as if for the stated amount "there were substituted an amount "equal to the appropriate fraction "thereof."

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Held, that the relevant "provision" was "made," for the purpose of section 486, before September 3, 1939—viz., on February 19, 1930. Accordingly the section applied.

Per Lord Evershed M.R. The presumed intention of the legislature was to remedy an injustice caused by the effect of war-time increases in taxation to heights undreamed of in pre-war philosophy. Since the covenantor (unlike a testator) had bound himself irrevocably, that injustice arose in the present case.

Per Romer L.J. "Provision" for the purposes of section 486 (1) (*b*) means the beneficial interest created, not the instrument or clause thereof creating it. The relevant date to consider was the date when the contingent right created was conferred and not when the annuity (if ever) became presently payable.

Berkeley v. *Berkeley* [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154 distinguished.

Decision of Danckwerts J. reversed.

Appeal from Danckwerts J.

In exercise of the powers conferred on him by a resettlement of his estate dated February 15, 1901, the then Duke of Westminster by clause A of a deed dated February 19, 1930, in consideration of his then intended marriage with the defendant, Loelia Mary, Duchess of Westminster, irrevocably appointed by way of jointure to her a clear yearly rentcharge of £6,000 to commence from his death and to issue out of certain freehold hereditaments. By clause B of the deed he covenanted with the defendant and also with the trustees of the deed that, if the intended marriage should be solemnised within six months from the date thereof, and the defendant should survive the covenantor, then his executors or administrators would, during her life, pay to her such a yearly sum as together with the jointure rentcharge thereinbefore appointed and for the time being actually payable to her would, after deduction of all income tax and surtax, and any other taxes whatsoever for the time being payable in respect of the said yearly sum and jointure rentcharge or either of them, leave the net yearly amount of £6,000 free from all death duties and deductions whatsoever, such yearly sum to commence from the death of the covenantor and to be payable quarterly on the usual quarter days and to belong to the defendant for her separate use without power of anticipation (except as in the deed specially provided) during any coverture. By the same clause the covenantor, in exercise of all relevant powers given to him by the resettlement (including any power of revocation and new appointment), so far as he lawfully could, irrevocably charged the hereditaments with the payment of the sum thereinbefore covenanted to be paid.

The marriage of the covenantor and the defendant was solemnised on February 20, 1930. On September 3, 1939, war was declared with Germany. The marriage was dissolved on February 3, 1947. The covenantor died on July 19, 1953, and the charge contained in the deed of covenant of February 19, 1930, became effective.

By this summons the plaintiffs, the executors of the covenantor, asked whether, upon the true construction of the deed of 1930 and of section 486 of the Income Tax Act, 1952, that section was applicable to the sums payable by them as such executors to the defendant during her life under the covenant contained in clause B of the deed, and if that question were answered in the affirmative, ancillary questions were asked.

Danckwerts J. held that section 486 was not applicable to the sums payable by the executors to the defendant under the covenant in the deed of 1930.

The plaintiffs appealed.

John Pennycuick Q.C. and *E. I. Goulding* for the plaintiffs.
Charles Russell Q.C. and *Desmond Miller* for the defendant.

The cases cited in argument are referred to in the judgments.

LORD EVERSHED M.R. stated the facts and continued: The question raised by the summons and argued upon this appeal is a question of the effect upon the deed of February 19, 1930, of what is now section 486 of the Income Tax Act, 1952 (formerly section 25 of the Finance Act, 1941). [His Lordship read subsection (1) of section 486, and continued:] The definition of "appropriate fraction" is to be found in subsection (5). It is conceded that "the appropriate fraction" in this case (if the section is applicable) is 23/29ths. It is also conceded that, if the section is applicable, the "stated amount" referred to is not the sum total of the obligations under the deed of appointment but what may be called the "making up" figure contained in paragraph (*b*).

At first sight, it would seem (with all respect) that the question is not a difficult one; for by the deed "provision" was "made" (and I use again the natural terms that I used at the beginning of this judgment) for the payment of a "stated "amount" free of income tax, that provision being contained in a deed made before September 3, 1939 (which hereafter, for brevity, I will call "the war date"), and not afterwards varied. But it has been argued in this court, and in the court below (and before Danckwerts J. the argument succeeded), that, upon more accurate use of language, it is not true to say, in the circumstances of this case, that provision for payment of the sum in question was made before the war date.

In the court below, the conclusion in favour of the defendant was largely influenced (as I follow Danckwerts J.'s judgment) by *Berkeley* v. *Berkeley*,[1] which Danckwerts J. thought bound him to hold as he did. In this court, the argument for the defendant by Mr. Charles Russell has, I think, been put on a somewhat different ground. But it will be convenient for me to turn first to *Berkeley* v. *Berkeley*.[1] It was a case (stating the facts quite

[1] [1946] A.C. 555; 62 T.L.R. 478; [1946] 2 All E.R. 154.

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briefly) in which, as a result of a will made before the war date by a testator who died afterwards, certain provisions for payment of annual sums in favour of his wife were made; and the question was whether it could be said that the appointment in favour of his wife contained in the testator's will made—that is, executed—before the war date, though the testator survived that date, constituted a provision made before that date within the meaning of the section (then section 25 of the Act of 1941).

The House of Lords answered that question negatively. As I read the speeches of the noble Lords, the ground upon which they founded their conclusion was, briefly, this: that a will in no sense is effective until the testator's death: until that date the will is liable at any time to be wholly revoked: it is a mere expression of intention at the time that it is made. Though a man might, no doubt, say in ordinary conversation during his life that he had "made provision" for his wife by his will, that in truth is not an accurate use of words: it only means, more strictly construed, that he has executed a will which, if unrevoked, will make provision for his wife on his death.

That view is also supported (as the noble Lords pointed out) by the presumed intention of the legislature—namely, to remedy an injustice caused by the effect of wartime increases in taxation to heights undreamed of in pre-war philosophy. There is, indeed, no doubt that the effect of the high rate of taxation is to impose a very great burden, or is liable to impose a very great burden, on estates which are under obligation to pay tax-free amounts of income. Nevertheless (as was pointed out in the House of Lords), one still living was always able, when new taxation was brought to his attention—and, as Lord Simonds observed, he would not be likely not to notice it—to alter his will; and, if he did not do so, he should be presumed to have intended the consequences. On the other hand, if the donor had already bound himself irrevocably, then there was no means whereby he himself could remedy the situation, except, of course, by obtaining, with the consent, if it could be obtained, of the beneficiary, a variation of his obligation—a situation contemplated and dealt with expressly by paragraph (*c*) in the first subsection of the Act.

I do not wish to take too much time by multiplicity of citations; but I would like to make some references first to the speech of Lord Simonds. He said this[2]: "The question is "whether for the purpose of this section provision is made by "will for an annual payment when the will is duly signed or when "by the death of the testator the will becomes operative. The "question here is not when the will was made but when pro-"vision was made, a distinction which escaped the notice of "the late MacKinnon L.J. and, as I think, led him into error in "*In re Waring.*[3]" A little later he said[4]: "It would have

[2] [1946] A.C. 555, 580.
[3] [1942] Ch. 426.
[4] [1946] A.C. 555, 580.

"been easy for the draftsman to refer the date to the document "and combine the first and second conditions. He did not do so "and I think that one good reason for not doing so was that, if "he had, the section might have had just the meaning for which "the respondents contend. But there would have been this "odd result that, whereas in every other case than a provision by "will the section would have dealt with rights known to the law "which had accrued at the war date, in the excepted case of a "provision by will it would have purported to operate on an "ambulatory document which had no force or validity whatever "at the war date and could have none until the testator died. By "introducing the date in a separate condition and providing that "the provision in question must be made before a certain date, "he postulates of every provision, however made, a common "content, namely, that it has a legal effect before that date." I take one last citation from that speech [5]: "Until a testator is "dead, the beneficiaries under his will have no better provision "than have the next of kin from their still intestate ancestor. "In my view the section must be read as dealing not with a spes "successionis nor with an expectation which rests upon a docu-"ment liable at any moment to be torn up and having no force in "the law, but with rights known to the law and enforceable by "one man against another."

Lord Uthwatt, after referring to the presumed legislative intention to which I have already made allusion, said this [6]: "One "further general observation may be made. Testamentary "instruments appear in subsection (1), in the middle of a list of "other instruments all of which were in effective operation on "September 3, 1939, and the section applies in the same way as "respects the effect of the 'provision' whatever be the character "of the instrument in which the 'provision' is contained. The "general lay out of the section as well as the substance of the "matter suggests that the legislature was dealing with a closed "series of transactions, involving therefore only the testamentary "dispositions of testators who died before the war date."

Finally, I go back to the leading speech of Viscount Simon, on which I think Danckwerts J. perhaps most particularly relied, since he made a citation from it immediately before the statement of his conclusion. Viscount Simon said [7] (and this is the passage, or part of it, which Danckwerts J. cited): "There is a "clear distinction drawn in the section between a provision 'con-"'tained' in a document irrespective of date and a provision "'made' before September 3, 1939. Language is very ineptly "used if one speaks of "making" a clause. It is not the instru-"ment, but the provision, for which a latest date is prescribed. "Moreover, all the other documents mentioned except a will or "codicil are such as would confer a vested right to the payment of

[5] [1946] A.C. 555, 581.
[6] Ibid. 586.
[7] Ibid. 566.

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"the annuity free of tax—a benefit which was created at a time "when income tax at 10s. in the pound was in no one's thoughts."

I will refer to another passage because I shall pick it up later [8]: "The will of a living testator, on the other hand, confers no "right on anyone to any benefit therein mentioned. Even if it "existed side by side with a covenant not to revoke, the covenantee "has no rights under the will until the testator is dead."

It will be noticed from the passages I have read (and it may be taken that the same is applicable to the passages which I have not read) that there is in the speeches no expression of opinion at all on what the effect of the section would be in such a case as the present. It was pointed out by Mr. Russell that if the matter was as simple as Mr. Pennycuick suggested, then one would perhaps have expected to find a statement of the simple contrast. But in truth it is, I think, clear that their Lordships adhered strictly, from beginning to end, to the particular—the sole—point which was before the House for its determination.

Danckwerts J. took it that the effect of the speeches was to lay it down—not only in the case of a will but in all cases—that a "provision made" meant, for the purposes of the section, a provision which had become effective in possession or enjoyment. As I indicated earlier, Mr. Russell did not go quite so far as that. His main argument was based on the contingencies in the relevant clauses of the appointment which I have read. I think Mr. Russell accepted the proposition that the word "payment" in subsection (1) must include payments in the future as well as present payments; and in any case I am satisfied that that must be so. But further, Mr. Russell—without, I think, conceding the point—was prepared to accept arguendo that the case might be otherwise if, for example, A covenanted, at a pre-war date, to pay to B x pounds per annum free of tax for ten years from some post-war date. But (as he said) that was not this case; and he contended (and with some truth) that this was not a matter where one could find some neat, logical pattern to cover all cases. All that Mr. Russell was concerned with in this case (as he pointed out) was this: that here the only effect that the deed could be said to have had on its execution before the war date was that there was a covenant or obligation, subject to two contingencies, to pay future annual sums; the two contingencies being, first, the contingency that the marriage take effect in six months, and, secondly, that the defendant survive the appointor. Mr. Russell did refer to a third contingency, as to availability of the subject-matter; but that I do not take further time about.

I agree entirely so far with Mr. Russell that we are only concerned with this case. Thus, I express no view, on the one hand, what would be the effect of the case intimated by Lord Simon, to which he did not give an answer, so far as relevant to this case—namely, the case where a man had executed a will

[8] [1946] A.C. 555, 566.

containing a provision such as you find here and at the same time executed a covenant not to revoke it. Equally, I express no view about what the effect of the section would be where there was an appointment somewhat in the same form as that in the present deed but where the deed contained an unqualified power of revocation at any time during the appointor's lifetime. I also express no view about what the situation would have been if the period of the marriage contingency had been extended to cover September 3, 1939, and the marriage had not in fact been solemnised on that date. The fact is, in the present case, that on September 3, 1939—on the war date—the marriage had been solemnised, and that on that date the covenantor had bound himself irrevocably, and charged his estates in support of his executors' obligations, to the defendant to pay her a stated amount if she survived him—that is, from the date of his own death—for the rest of her life.

Applying the ordinary tests of language—according, that is, to its ordinary common-sense usage, which is, I apprehend, appropriate to an Act of Parliament, in the absence of something special—I think that a "provision" had been "made" before September 3, 1939, for payment of a "stated amount."

I accept the test which Mr. Pennycuick put in the course of his reply: The defendant is now in receipt of certain annual sums: and if the question be asked, by virtue of what right is she being paid? the answer is, surely: the right which was created by the execution of the appointment before the war date.

It will be noticed that the other view would at any rate lead to very extraordinary anomalies. I take, as an example, the distinction (if Mr. Russell's argument is right and if the concession that he made in argument be made) between these two cases—between, first, a right to receive x pounds contingent on the recipient attaining twenty-one or surviving a particular date, and, secondly, an absolute right to receive, from some future date, whether the beneficiary survives or not, a stated amount, or to receive such a stated amount subject to some prior interest. If the test is applied which was applied in *Berkeley* v. *Berkeley* [9]—that of considering the purpose of the legislation—it is plain that there can be no distinction whatever between the two cases which I have suggested: in both cases an obligation has been entered into which would result in a liability which, regarded from this standpoint, could not have been intended, and from which there can be no escape—apart from voluntary variation or as a result of the legislation.

Similarly, Ormerod L.J., in the course of the argument, put the case of a will, not only made, but proved, before the war date, but containing a provision for payment of some future stated amount. Once again it is plain that, if the evil which the legislature intended to remedy be looked at, that is a case where legislation

[9] [1946] A.C. 555.

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is as much required as it would be in the straightforward case of an obligation, which had become effective in possession by the war date, to pay a stated sum in a certain event.

I should add that reference was made in the course of the argument to *Inland Revenue Commissioners* v. *Saunders.*[10] There was in that case some reference to *Berkeley* v. *Berkeley* [11]; but in my judgment the references do not carry the matter any further.

I, therefore, for my part conclude, first, that there was nothing in the reasoning or the speeches in *Berkeley* v. *Berkeley* [11] which binds this court to hold in favour of the defendant; and, secondly, that, the matter being treated, therefore, as res integra, the case falls clearly (as I think) within the terms of the section, construed according to the ordinary standards of language.

I would therefore, for those reasons, allow the appeal.

ROMER L.J. I agree.

In *Berkeley* v. *Berkeley* [11] the House of Lords held (in effect) that "provision," in relation to section 486 (1) (*b*) of the Act of 1952, means the beneficial interest created by an instrument and not the instrument itself or a clause thereof. That being so, it appears to me that in the present case two questions arise: (1) what beneficial interest, if any, was created in the defendant's favour by the deed of 1930? and (2) was such interest one within the scope of the section?

Now as to the first question, the interest which had been created by the covenant in favour of the defendant was the right, on a future contingency, to receive a tax-free annuity out of the covenantor's estate. There is no doubt but that, at the relevant date, namely, September 3, 1939, there was an irrevocable future obligation on the covenantor's legal personal representatives to pay the annuity out of the assets of the estate if the contingency occurred, namely, if the covenantor died leaving the defendant surviving; and a corresponding right was vested in the defendant to receive it. There was no power reserved by the covenantor under which the defendant could be deprived of the right to receive the annuity if she survived her husband, and no power to release the covenantor's estate from the liability to pay it. It follows, therefore, that a beneficial interest was conferred on the defendant by the deed.

The second question that arises is whether that interest is one to which the modifying provisions of the section apply. If the section were confined to a right created before the relevant date to receive immediate payment of a tax-free annuity, then the defendant's contingent right to her future annuity would remain unaffected. In other words, a question posed by Mr. Russell during the course of the argument would require a negative answer. That question was (as Mr. Russell put it): in this case,

[10] [1958] A.C. 285; [1957] 3 W.L.R. 474; [1957] 3 All E.R. 43.

[11] [1946] A.C. 555.

had there been provided before September 3, 1939, a tax-free annuity for the defendant? Mr. Russell said the answer must be "No," and that only the covenantor's legal personal representatives were or might become under an obligation to provide it. It seems to me that that was a somewhat formidable way of putting Mr. Russell's case; but I think the true answer to it is this: that the section is not, in its terms, confined to annuities immediately payable, and I can see no warrant for reading in a qualification which would in great measure whittle down—and for no intelligible reason—the effect of the section. Nor can I see anything in the speeches in *Berkeley* v. *Berkeley* [11] to suggest that the section is only concerned with annuities immediately payable, so that it excludes annuities payable upon future contingencies. On the contrary, all their Lordships seem to have recognised that a right to a tax-free annuity, whether at law or in equity, which had been created before September 3, 1939, was within the section, so long as it really was a right; and none of them suggested that the annuity must be presently payable.

On September 3, 1939, the defendant's position was that the interest which she then had under the deed was a contingent legal right to a future annuity which would ripen into a right to present payment if she survived her husband; and I agree with Mr. Pennycuick that the relevant date to consider is the date when this contingent right to receive the annuity was conferred and not the date when the annuity should become presently payable, if it became payable at all.

In conclusion, I would say that it is quite clear to me that the judge himself would have given effect to this view had he not thought himself precluded from so doing by the speeches in *Berkeley* v. *Berkeley*.[11] For my part, I am satisfied that the speeches do not have that result; and I accordingly agree that this appeal must be allowed.

ORMEROD L.J. I agree; and although we are differing from the judge there is nothing that I wish to add to the reasons which have been given by my Lords.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *William Charles Crocker; Sydney Morse & Co.*

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[11] [1946] A.C. 555.

[HOUSE OF LORDS.]

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Jan. 28.

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AND

ST. MARYLEBONE BOROUGH COUNCIL . Respondents.

Rates and Rating—Social welfare—Health—Council required by statute to maintain register of nurses—Claim for rating relief—Advancement of "social welfare"—Meaning—Nurses Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 15)—*Rating and Valuation* (*Miscellaneous Provisions*) *Act,* 1955 (4 *Eliz.* 2, *c.* 9), *s.* 8.

An organisation which was regulated by the Nurses Act, 1957, and thereby required (inter alia) to maintain a register of nurses and to exercise supervisory powers in training and examination in pursuance of the Nurses Registration Act, 1919, claimed the benefit of the rating relief afforded by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to organisations "not . . . conducted for profit and whose objects "are charitable or are otherwise concerned with the advancement "of religion, education or social welfare" within section 8 (1) (*a*):—

Held (Lord Cohen and Lord Somervell of Harrow dissenting), that the organisation did not come within the words of section 8 (2).

Per Lord Morton of Henryton, Lord Tucker and Lord Keith of Avonholm. The object of the organisation to regulate the profession of nursing in the manner and to the extent set out in the Act was neither charitable nor otherwise concerned with the advancement of social welfare.

Per Lord Cohen. The organisation has two main objects, the enhancement of the quality and status of nurses and the protection of the public, particularly the sick; the former, which was a main object and not merely ancillary, was not charitable. But both objects were otherwise concerned with the advancement of social welfare.

Per Lord Somervell of Harrow. The advancement of the care of the sick was the advancement of social welfare.

General Medical Council v. *Inland Revenue Commissioners* (1928) 97 L.J.K.B. 578; 44 T.L.R. 439 and *General Nursing Council for Scotland* v. *Inland Revenue Commissioners,* 1929 S.C. 664; 14 T.C. 645 approved.

National Deposit Friendly Society Trustees v. *Skegness Urban District Council* [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601 considered.

Decision of the Court of Appeal [1958] Ch. 421; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685 affirmed.

Appeal from the Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal dated November 26, 1957, reversing an order of the Chancery Division (Danckwerts J.) made on June 27, 1957. The last-mentioned order was made in proceedings commenced by originating summons issued by the appellants, the General Nursing Council

* *Present*: Lord Morton of Henryton, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow.

for England and Wales, against the respondents, the St. Marylebone Borough Council (who were the rating authority for the borough of St. Marylebone), for the determination of the question whether on the true construction of section 8 (1) (*a*) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the appellants were such an organisation as was therein mentioned.

The facts are set out in the opinion of Lord Morton of Henryton.

G. D. Squibb Q.C. and *William Roots* for the appellants.
Geoffrey Cross Q.C. and *E. B. Stamp* for the respondents.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Royal College of Nursing* v. *St. Marylebone Borough Council* [1]; *Derbyshire Miners' Welfare Committee* v. *Skegness Urban District Council* [2]; *Berry* v. *St. Marylebone Borough Council* [3]; *Independent Order of Oddfellows Manchester Unity Friendly Society* v. *Manchester Corporation* [4]; *Working Men's Club & Institute Union Ltd.* v. *Swansea Corporation* [5]; *Brownsea Haven Properties Ltd.* v. *Poole Corporation* [6]; *Pig Marketing Board (Northern Ireland)* v. *Inland Revenue Commissioners* [7]; *Morice* v. *Bishop of Durham* [8]; *In re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [9]; and *Inland Revenue Commissioners* v. *Baddeley.* [10]

Their Lordships took time for consideration.

Lord Morton of Henryton. My Lords, I shall hereafter refer to the appellants as "the council."

The only issue on this appeal is whether the council is entitled to partial relief from rates pursuant to section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I shall refer to that Act as "the Rating Act of 1955." The material part of section 8 is as follows:

"Provisions as to rates payable by charitable and other "organisations.

"8.—(1) This section applies to the following hereditaments, "that is to say—(*a*) any hereditament occupied for the purposes "of an organisation (whether corporate or unincorporate) which "is not established or conducted for profit and whose main objects "are charitable or are otherwise concerned with the advancement

[1] [1958] 1 W.L.R. 95; [1958] 1 All E.R. 129.
[2] [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1049; [1957] 3 All E.R. 692.
[3] [1958] Ch. 406; [1957] 3 W.L.R. 1029; [1957] 3 All E.R. 677.
[4] [1958] 1 W.L.R. 1171; [1958] 3 All E.R. 378.
[5] [1958] 1 W.L.R. 1135; [1958] 1 All E.R. 414.
[6] [1958] Ch. 574; [1957] 3 W.L.R. 669; [1957] 3 All E.R. 211.
[7] [1945] N.Ir. 155; 26 T.C. 319.
[8] (1805) 10 Ves. 521.
[9] [1958] 3 W.L.R. 701; [1958] 3 All E.R. 465.
[10] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.

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"of religion, education or social welfare; (*b*) any hereditament "held upon trust for use as an almshouse; (*c*) any hereditament "consisting of a playing field (that is to say, land used mainly or "exclusively for the purposes of open-air games or of open-air "athletic sports) occupied for the purposes of a club, society or "other organisation which is not established or conducted for "profit and does not (except on special occasions) make any "charge for the admission of spectators to the playing field: "Provided that this section shall not apply to any hereditament "to which section 7 of this Act applies, or to any hereditament "occupied by an authority having, within the meaning of the "Local Loans Act, 1875, power to levy a rate."

The remaining subsections grant certain reductions in the rates chargeable in respect of any hereditament to which the section applies.

The council is a body corporate established by the Nurses Registration Act, 1919, and now has the powers and duties conferred and imposed on it by the provisions of the Nurses Act, 1957, which consolidates the Act of 1919 and certain subsequent Acts. It is common ground between the parties that the powers and duties of the council under the Act of 1957 do not differ in any material respect from its powers and duties at the time when the Rating Act of 1955 became law.

It is also common ground between the parties that the council is "an organisation which is not established or conducted for "profit," but it has to be determined, on this appeal, whether its "main objects" are such as to bring it within section 8 (1) (*a*) of the Rating Act of 1955. The council is, and was at all material times, the rateable occupier of premises known as Nos. 17 and 23–25 Portland Place in the Metropolitan Borough of St. Marylebone. These premises are occupied for the purposes of the council. The respondents, who are the rating authority for that borough, refused to recognise the council as an organisation such as is mentioned in section 8 (1) (*a*) of the Act. Danckwerts J. granted the council a declaration that it is such an organisation, but his decision was reversed by the Court of Appeal.

Having regard to the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Commissioners* [1] and to the decision of the Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[2] it was not contended before Danckwerts J. and the Court of Appeal that the council can be regarded as an organisation whose main objects are charitable, and the judgments of Danckwerts J. and the Court of Appeal were solely concerned with the question whether the main objects of the council are "otherwise concerned with the "advancement of social welfare." In this House it was contended on behalf of the council that its main objects are charitable

[1] (1928) 97 L.J.K.B. 578; 44 T.L.R. 439.

[2] 1929 S.C. 664; 14 T.C. 645.

or, in the alternative, are otherwise concerned with the advancement of social welfare.

My Lords, it is thus apparent that in order to decide the issue between the parties it is necessary to decide the following questions: (1) What are the "main objects" of the council within the meaning of section 8 (1) (*a*) of the Rating Act, 1955? (2) Are these main objects charitable? (3) If not, are these main objects "otherwise concerned with the advancement of social "welfare"?

It is, of course, possible that the council has only one main object, but if it has more than one it will not be an organisation within subsection 8 (1) (*a*) unless all its main objects come within that subsection.

In order to answer the questions just stated, it is necessary to consider the provisions of the Nurses Act, 1957, in some detail, since, in accordance with modern custom, there is no preamble to the Act, and the objects of the council can only be ascertained by a study of these provisions. I must, therefore, refer to them in some detail.

Section 1 (1) of the Act is as follows: "The body established "by section 1 of the Nurses Registration Act, 1919, by the name "of the General Nursing Council for England and Wales shall "continue in existence by that name and shall have such powers "and duties as are conferred and imposed on them by the "following provisions of this Act."

Section 1 (2) and Schedule I state what the constitution of the council is to be.

Section 2 is as follows: "(1) It shall be the duty of the "council—(*a*) to maintain, in accordance with rules in that behalf "made by them, a register of nurses established in pursuance of "the Nurses Registration Act, 1919, which shall consist of— "(i) a general part containing the names of all nurses who satisfy "the conditions of admission thereto; (ii) a part containing the "names of nurses trained in the nursing and care of persons "suffering from mental diseases; (iii) a part containing the names "of nurses trained in the nursing of sick children; and (iv) such "other parts as may be prescribed; (*b*) to maintain, in accordance "with rules in that behalf made by them, the roll of assistant "nurses established in pursuance of Part I of the Nurses Act, "1943. (2) Where a person satisfies the conditions of admission "to a part of the register other than the general part, his name "may be included in that other part notwithstanding that it is "also included in the general part. (3) A certificate under the "seal of the council duly authenticated stating that a person is, "or was at any date, or is not, or was not at any date, duly "registered or enrolled shall be evidence in all courts of law of "the facts stated in the certificate."

Under section 3 (1) the council is to "make rules for regu- "lating the conditions of admission to the register and to the roll

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"respectively and the conduct of any examinations which may "be prescribed as a condition of admission thereto and any "matters ancillary to or connected with any such examinations, "and any such rules shall contain provisions—(*a*) requiring, as a "condition of the admission of any person to the register or the "roll, that that person shall have undergone the prescribed train-"ing, and shall possess the prescribed experience, in nursing; "and (*b*) requiring that the prescribed training shall be carried "out either in an institution approved by the council in that "behalf or in the service of the Admiralty, the Army Council or "the Air Council."

The section also provides for the payment to the council, in respect of applications for examination, registration or enrolment, such fees as the council may, with the approval of the Minister of Health, from time to time determine.

In section 4 there is provision for the registration of nurses trained abroad, and in section 5 there is provision for a list of persons neither registered nor enrolled, who completed a course of nursing in a satisfactory institution before July 1, 1925. Section 6 deals with the admission to the register of certain persons there specified.

Section 7 provides for the council making rules concerning removal from, and restoration to, the register, roll and list. Under section 10: "The council shall make rules providing for "the issue of certificates to persons registered or enrolled and "with respect to the uniform or badge which may be worn by "persons registered and persons enrolled respectively."

Sections 11 to 16 inclusive deal with the training of nurses. It is, I think, sufficient to set out section 11 (1) to (3)—

"11.—(1) The Minister shall by order constitute, in accordance "with Schedule II to this Act, a committee (in this Act referred "to as an 'area nurse-training committee') for each hospital "area; and before making an order under this subsection with "respect to any such area the Minister shall consult with the "council. (2) It shall be the duty of the area nurse-training "committee for a hospital area—(*a*) to have constant regard, as "respects persons engaged in the area in the training of nurses, "to the methods employed by those persons of training nurses; "(*b*) to promote, with a view to securing the improvement of "methods employed in the area of training nurses, research and "investigation into matters relating to the training of nurses, and "to render to the council reports of the results of research and "investigation promoted by the committee; (*c*) to advise and "assist—(i) hospital management committees appointed by the "regional hospital board for the area; (ii) boards of governors of "teaching hospitals situated in the area; and (iii) any other "authority or person engaged in the area in the training of nurses "who makes a request in that behalf to the committee; in the "preparation and carrying out of schemes for the training of "nurses in accordance with any requirements of the council for

"the time being in force with respect to the training to be undergone by persons as a condition of their admission to the register or the roll; and (*d*) to advise and, if requested by the council so to do, to assist the council in matters relating to the approval by the council, for the purposes of the training rules, of institutions situated in the area. (3) An area nurse-training committee may, if authorised by the council so to do, conduct on their behalf any examination prescribed by rules made by the council under section 3 of this Act or specified in a scheme adopted under the next following section."

No provision in this group of sections requires or enables the council itself to train nurses. By section 15 all expenses incurred by an area nurse-training committee with the approval of the council are to be defrayed by the council, but with this should be read section 26, which provides that: "All expenses incurred by the council with the approval of the Minister which are attributable to defraying expenditure incurred by area nurse-training committees (other than expenditure incurred by such committees in conducting examinations on behalf of the council) shall be defrayed by the Minister out of moneys provided by Parliament, and all other expenses incurred by the council under this Act shall be defrayed by the council."

Section 23 enables the council to charge fees for certain services to nurses and others.

Section 27 provides for penalties for false assumption of the title of registered or enrolled nurse, and section 28 imposes penalties for the use of the title "nurse" by anyone who is not a duly registered nurse or assistant nurse.

Section 30 confers on the council power to "make rules for prescribing anything which by this Act is required or authorised to be prescribed and generally for making provision with respect to any matters with respect to which the council think that provision should be made for the purpose of carrying this Act into effect." Rules have in fact been made under the provisions of that section, but no rule made by the council under the Act can come into operation unless and until it is approved by the Minister of Health.

I would accept, as a convenient summary of the provisions of the Act, the words of the Master of the Rolls [3]: "It is, in our judgment, sufficient and sufficiently accurate to state that the purposes and functions of the council were and are to maintain a register of nurses, together with a roll of assistant nurses; to regulate accordingly the conditions of admission to and removal from the register and the roll, and, in connection therewith, to exercise supervisory and directing powers in regard to training and examinations; and to exercise such other powers and duties as are ancillary to and consequent upon the foregoing. The income of the council appears to be in part derived from fees

[3] [1958] Ch. 421, 429; [1957] 3 W.L.R. 1039; [1957] 3 All E.R. 685.

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"which the council are authorised to charge upon applications for "examination and registration or enrolment and the like, and "as to the rest from moneys directly or indirectly provided by "Parliament."

In considering what are the main objects of the council, in the light of all the provisions of the Act, and whether these objects are charitable, it is right to turn first to the cases of *General Medical Council* v. *Inland Revenue Commissioners*[4] and *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*[5] already mentioned. In the former case the Court of Appeal held that the General Medical Council was not "established for charitable purposes only" within section 37 (1) (*b*) of the Income Tax Act, 1918. Mr. Squibb, for the appellant council in the present case, submitted that the *General Medical Council* case[6] was distinguishable on its facts from the present case; alternatively, that it was wrongly decided.

My Lords, I shall not detain you by endeavouring to summarise the provisions of the statute which established the General Medical Council. Suffice it to say that although there are certain differences between its provisions and the provisions of the Nurses Act, 1957, the two cases are, to my mind, indistinguishable as regards the main object of the bodies incorporated by these Acts respectively.

In the *General Medical Council* case[7] Sargant L.J. said: "I "think myself that the whole scheme of this legislation is to regu-"late the profession of medical men, who in consequence have "certain privileges conferred upon them by the legislation, and "that it is in the first instance as a professional measure that the "legislation is to be regarded. No doubt, as I have said, the "result of that strict qualification and supervision will be to the "public advantage. Exactly the same thing might be said of "the regulations which govern the admission of qualified persons "to the ranks of solicitors and barristers, or any other scientific "profession. I agree with the Master of the Rolls that a very "great deal is to be learnt from the judgments in the *Forrest* "case[8] with regard to the Institution of Civil Engineers, and "particularly in the distinctions which are drawn there by Lord "Watson between that case and the case with regard to the "Writers to the Signet. It seems to me that here we clearly have "an institution or society which is of the same nature as the "society known as Writers to the Signet, and that it differs from "the Institution of Civil Engineers." I agree with these observations, and, in my view, they can properly be applied to the appellant council in the present case. I think that the council, formed as it is to exercise statutory powers and discharge statutory duties, has only one main object, namely to regulate the profession of nursing in the manner and to the extent set out in the

[4] 97 L.J.K.B. 578.
[5] 1928 S.C. 664; 14 T.C. 645.
[6] 97 L.J.K.B. 578.
[7] Ibid. 587–588.
[8] (1890) L.R. 15 App.Cas. 334; 6 T.L.R. 456.

Nurses Act, 1957. The *General Medical Council* case [9] was, in my opinion, rightly decided, and the object which I have just stated is not a charitable object, giving to the word "charitable" its meaning in law as established in many cases.

It follows from the view which I have just expressed that I cannot accept some of the expressions of opinion by the learned judges of the Court of Session in the case of the *General Nursing Council for Scotland* [10] as to the purposes for which that council was established, although I do not doubt that the court was right in following the *General Medical Council* case [11] and holding that the General Nursing Council for Scotland was not established "for charitable purposes only." Before I leave the question of charity, I ought to refer to the case of *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[12] In that case this House held that the college was in law a charity, because its object was "the due promotion and encouragement of the "study and practice of the art and science of surgery," words which appeared in the recitals to its charter. The case is thus clearly distinguishable from the present case.

I now turn to the last question arising on this appeal. Having regard to my opinion that the sole main object of the council is to regulate the profession of nursing, in the manner and to the extent set out in the Nurses Act, 1957, that question must now be restated as follows: Is that object, which is not charitable in the legal sense, "otherwise concerned with the advancement of "social welfare"? My Lords, this is, to my mind, a question of great doubt, and I have found it difficult to choose between the two lines of argument so ably presented in this House; but in the end I find myself in agreement with the views which are about to be expressed on this point by my noble and learned friend, Lord Keith of Avonholm.

I would answer this last question in the negative and would dismiss the appeal.

Lord Tucker. My Lords, in order to succeed in this appeal the appellant council has to establish that it is an organisation whose main objects are charitable or are otherwise concerned with the advancement of social welfare. It was conceded by counsel in the courts below that, in view of the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Commissioners*,[13] he could not argue that the main objects of the council were charitable, but he formally took the point in order to enable him to contend in this House that the last-named case was wrongly decided. In my opinion it was not open to him in these circumstances to invite your Lordships to distinguish the present case from that of the General Medical Council, and I did not understand him to do so. I would add, however, that having

[9] 97 L.J.K.B. 578.
[10] 1929 S.C. 664; 14 T.C. 645.
[11] 97 L.J.K.B. 578.
[12] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.
[13] 97 L.J.K.B. 578.

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examined the facts in each case I am satisfied that there is not sufficient ground for differentiation, nor am I persuaded that the decision in the *General Medical Council* case was wrong.

My Lords, my noble and learned friend on the Woolsack has examined the provisions of the Nurses Act, 1957, and my noble and learned friend, Lord Keith of Avonholm, whose opinion I have had the advantage of reading, will also give a detailed examination of the Act. I therefore content myself with stating that such examination in my view discloses that the main objects of the council are (1) to maintain a register of nurses and roll of assistant nurses, and (2) to make rules regulating the conditions of admission to the register and roll, neither of which, as distinguished from the ultimate benefits which may be expected to result from the legislation, are to be regarded as charitable.

With regard to the second limb of section 8 (1) (*a*) of the Act of 1955, which, in my view, can only be invoked if and when it has been decided that the main objects of the organisation are not charitable, I agree with the opinion which my noble and learned friend, Lord Keith of Avonholm, will shortly express.

I would accordingly dismiss the appeal.

LORD COHEN. My Lords, the questions which your Lordships have to decide are two—(1) Are the main objects of the council charitable? If not, (2) Are they "otherwise concerned with the "advancement of . . . education or social welfare" within the meaning of section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955?

Strictly speaking, it might suffice to answer the second of those questions, but, as both were fully argued before your Lordships, I think it better to express my opinion on both questions.

Mr. Cross submitted that the only main object of the council is the keeping of the register with subsidiary duties of prescribing, training and conducting examinations, and that this is not a charitable object.

I cannot take so narrow a view of the Act. Looking at it as a whole I think there were two main objects, on the one hand the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. I borrow this statement of the purpose of the Act from the judgment of the Master of the Rolls. He did not have to consider the question whether on this basis the main objects of the council were charitable, since it was admitted in the Court of Appeal that having regard to the decision of this court in *General Medical Council* v. *Inland Revenue Commissioners* [13] and of the Scottish Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* [14] the Court of Appeal could not hold that the objects of the council were not charitable. Before us, however, Mr. Squibb submitted that the Scottish case was

[13] 97 L.J.K.B. 578.

[14] 1929 S.C. 664; 14 T.C. 645.

distinguishable, and that the *General Medical Council* case [15] was wrongly decided and could not be reconciled with the decision of this House in the case of *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[16] In the last-mentioned case the majority of their Lordships were able to find that the main object of the college was the improvement of the art and practice of surgery, and that in so far as these were provisions which might be directed to the enhancement of the status of surgeons or the protection of their professional interests they were purely ancillary. Their Lordships were therefore able to hold that the college was a charity. I was a dissentient in that case but I accept, of course, the decision then reached. In the present case, however, I think it is impossible to hold that the enhancement of the qualities and status of nurses is a mere ancillary object of the council. It is, I think, a main object and it is not charitable. I would answer the first question I have stated in the negative.

But, although the enhancement of the qualities and status of nurses is not a charitable object, it does not necessarily follow that it is not "otherwise concerned with the advancement of . . . "education or social welfare." The Court of Appeal held that it was not, but I am unable to agree with them.

On this point I have had the opportunity of reading in print the speech which will in due course be delivered by the noble and learned Lord, Lord Somervell of Harrow. I agree so fully with him that I shall state quite shortly my reasons for differing from the Court of Appeal. I agree with the Master of the Rolls that not every organisation established for benefiting the public can be treated as one the main objects of which are concerned with the advancement of social welfare. It is not easy to define exactly the meaning of social welfare but I am prepared to agree with Mr. Squibb that social welfare includes the relief of persons or classes of persons who by reason of their circumstances are in special need of relief of a kind analogous to that contemplated by the Statute of Elizabeth. I think that an organisation established for the purpose of assisting in the provision of such relief is an organisation concerned with social welfare within the meaning of section 8 of the Act of 1955.

Now what is the position of the council? I would adopt the language of the Lord President (Lord Clyde) in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[17] where he said that "its main object was to raise the standard of sick-"nursing in Great Britain." In view of what I have already said I must, however, qualify his statement by adding that the council has also the object of enhancing the status and qualities of nurses.

Now the nursing of the sick is, in my opinion, relief plainly analogous to that contemplated by the Statute of Elizabeth, and if the provision of skilled nurses for the nursing of the sick had been the sole object of the council, I cannot doubt that it would

[15] 97 L.J.K.B. 578.
[16] [1952] A.C. 631.
[17] 1929 S.C. 664, 677; 14 T.C. 645, 660.

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have been "otherwise concerned with . . . social welfare" within the meaning of the section. It is said that the professional aspect of the other objective, "the enhancement of the status and qualities of nurses," excludes the council from the benefit of the section. But the two objects are, as was said by the Master of the Rolls, essentially inseparable. If I had to say which was "primus inter pares," I should unhesitatingly choose the protection of the public by the provision of skilled trained nurses. Moreover, the council has an educational flavour through its responsibilities in connection with training and examinations. In these circumstances, it seems to me that both the main objects of the council are concerned with social welfare, and that your Lordships would be placing too narrow a meaning on the wide words of the section if your Lordships were to exclude the council from the relief granted by the section merely because the aspect of good works to which the Master of the Rolls refers is missing from its functions.

I would allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, on the view I take, this case lies within a very short compass. For a time I thought it might be decided on the broad ground that, to use the words of Lord President Clyde in *General Nursing Council for Scotland* v. *Inland Revenue Commissioners*,[17] the object of the appellant council "was to raise the standard of sick-nursing." I have come to the view, however, that that would be to proceed on a false premise. For one thing, the statement is something in the nature of a surmise or speculation. There is nothing in the Nurses Act, 1957, or its statutory precursors, that says this is the object of the council. There may be some, if not many, for all I know, who would say that the standard of sick-nursing was as high 50 years ago as it is today. It may be that one result of the Act is to increase the number of persons who reach the standard. But that again may be no more than the result of economic, social and political changes in the structure of society. There are other surmises that are equally possible, as, for instance, that the purpose was to improve the status and protect the profession of nurses.

In my opinion the only way by which the main objects of the appellant council can be ascertained is by looking at the objects as expressed in the Act. It is by the language used that Parliament has expressed its intention, and it is the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the results of its activities at second or third hand.

When I turn to the Act I find only two main objects for which the council was constituted. First, it has to maintain a register of nurses, a roll of assistant nurses and the list of persons, neither

[17] 1929 S.C. 664, 677.

registered nor enrolled, who within two years of the passing of the Nurses Act, 1943, were admitted to the list in respect of training in nursing prior to July, 1925. Copies of the register, the roll and the list are to be open for inspection by the public. Its second main function is to make rules for regulating the conditions of admission to the register and to the roll, and the conduct of examinations which may be prescribed as a condition of such admission. These conditions are to include prescribed training and prescribed experience in nursing, and the prescribed training shall be carried out in an institution approved by the council or in the service of the Admiralty, the Army Council or the Air Council. These rules must be approved by the Minister of Health and are incorporated in a statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament. These two functions are undoubtedly closely related, and it might be possible to express them as one object but I am content to take them as two objects. Everything else in the Act affecting the council is, in my opinion, properly incidental to these two main functions.

It may be observed that though the council prescribes the course and syllabus of training and approves the training institutions, area nurse-training committees are separately constituted by the Minister to concern themselves with the training of nurses and to advise and assist hospital management committees and boards of governors of teaching hospitals, and other authorities and persons engaged in the training of nurses, in the preparation and carrying out of schemes for such training in accordance with the council's requirements. The cost of training incurred by hospital management committees and teaching hospitals is defrayed by the nurse-training committees, who recover the amount from the council, who in turn recover the money from the Minister out of moneys provided by Parliament. In my opinion the functions of the area nurse-training committees stand apart from those of the council though they are, of course, helpful to the council in securing the entry of properly qualified nurses to the register and the roll.

It may be further observed that the council, being a statutory body, is strictly confined within its powers as fixed by the statute, and at various points can only act with the approval of the Minister. It must report annually to the Minister as to the discharge of its functions with respect to the training of nurses and the Minister must lay the report before Parliament. In my opinion, the respondents are right in their submission, as stated in the first reason in their case, that the appellants are established for the purpose of exercising statutory powers and carrying out statutory duties relating to the keeping of a register of nurses, if it be remembered that one of these duties is concerned with the training of nurses, in so far as the council has to prescribe courses of training and approve training institutions under section 3 of the

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Act, in order that nurses may achieve the standards of knowledge and experience necessary for admission to the register or roll.

The question is whether the two objects to which I referred at the outset "are charitable or are otherwise concerned with the "advancement of religion, education or social welfare." The first of these main objects, the registration of nurses, if considered by itself, clearly could not, in my opinion, be regarded as either charitable or concerned with social welfare. But, it is said, the conditions as to training and experience imposed as a pre-requisite of registration make the council a charitable organisation, because these conduce to the advancement of the nursing of sick persons, which is a charitable object. But assuming for the moment that this is a consequence of imposing these conditions, that cannot, in my opinion, be said to be the reason why they were imposed. The reason was to secure that only properly qualified persons should be registered. That clearly was the direct object indicated by the Act. We are not concerned with indirect consequences nor entitled to speculate on what ultimate purposes, if any, Parliament had in view. Apart from this, the hypothesis of the appellants may, I think, be questioned. In the days when hospitals trained their own nurses, independently of outside regulation, and were treated as charitable institutions, it was not, as I understand it, because they trained nurses for sick-nursing that they were treated as charitable institutions, but because they were established for nursing the sick poor. The present case is not like that of the *Royal College of Surgeons*,[18] whose objects were the due promotion and encouragement of the study and practice of the art and science of surgery. So far as the Nurses Act guides us the council was created to provide a register and roll of nurses and impose rules to secure that they were properly qualified for admission. The Act expressly states in section 3 (2) (*b*) as one of its aims, to secure a uniform standard of qualification in all parts of the United Kingdom. I have no doubt the Act was of public benefit, as one must assume most legislation to be. But the question is: Was what the council was created to do and does charitable? I cannot hold that it was. It may be that at some distance more or less remote what it does redounds to the interests and benefit of charitable organisations. So is it when a benefactor does something for a charity. But that does not create him a charity. The test of the matter, in my opinion, is to consider the content, or character, of the functions discharged by the council and ask, Are these charitable? I cannot hold that they are.

I have not referred so far to the sections of the Act which make it an offence for a person not duly registered to take or use the name or title of "registered nurse," or for a person not duly enrolled to pass herself off as an enrolled assistant nurse, or for a

[18] [1952] A.C. 631.

person to use the name or title of "nurse" (with certain exceptions) who is neither a registered nurse nor an enrolled assistant nurse. If it is legitimate to look at the effect of the Act at all, as distinct from the actual functions imposed by the Act on the council and their content, it appears to me to be easier to say that one of its results was to raise the professional status of nurses and to protect them in the exercise of their profession, than to say the result was to advance the nursing of sick persons. From this point of view I think the case is indistinguishable from *General Medical Council* v. *Inland Revenue Commissioners*.[19] I think also, as Rowlatt J. (with whom Lord Hanworth M.R. was prepared to agree) thought in that case, that the present case is just another instance of an organisation performing administrative functions under Parliamentary authority which, though for the public benefit, can in no sense be regarded as of a charitable nature. I agree with those of your Lordships who think that that case was rightly decided.

I turn now to consider whether the council comes under the other limb of section 8 (1) (*a*) of the Act of 1955 as being an organisation whose main objects "are otherwise concerned with "the advancement of . . . social welfare." The considerations which influenced me on the charitable aspect of the matter seem to me to be equally applicable here. However wide a meaning is given to "social welfare" or to "the advancement of social "welfare," the objects or functions of the council, in my opinion, are not concerned with either. Danckwerts J., taking the view apparently that the council was established in the general public interest, held that it came within the subsection. "It was not "established," he said,[20] "as it seems to me, for the purpose "of raising the professional status of the nurses, but for the "purpose of creating a system of registration so as to prevent "incompetent nurses being able to victimise the public, and for "making sure that the public should receive the services only "of competent nurses. That seems to me to be the establish-"ment of a body for the purpose of benefiting the public, and, "therefore, for a purpose, as it seems to me, of social welfare." But, accepting the hypothesis on which he bases his conclusion, I cannot accept public benefit as the test of social welfare, though social welfare may be a public benefit, and the appellants' counsel were not able to support this view of the learned judge. I would accept the words of the Master of the Rolls where he says[21]: "It is not enough that the objects of the organisation are in some "degree related to the advancement of social welfare; they must "in a real sense be directed to it." For the reasons I have given the objects of the council are not, in my opinion, "directed" to social welfare.

[19] 97 L.J.K.B. 578.
[20] [1957] 1 W.L.R. 941, 946–947; [1957] 2 All E.R. 791.
[21] [1958] Ch. 421, 434.

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If I had felt myself competent to take a different view the appellants would still have been faced with a difficulty. It could not, in my opinion, be said that the mere keeping of a register or roll of nurses was an object concerned with the advancement of social welfare. It would have to be said that this was merely incidental to the one and main object of the council, to secure the proper training of nurses, which was an object of social welfare. This, to my mind, would be to put a forced construction upon the Act. A more natural construction, I think, would be that the main object is to maintain a register and roll and that the other was ancillary to that purpose. But on the assumption that there are two main objects, one of which is concerned with the advancement of social welfare and the other is not, it would be impossible, in my opinion, to say that the "main objects" were concerned with the advancement of social welfare.

For the other reasons, however, which I have already stated, I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, section 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act is framed in words capable of a very wide construction. I cannot think it would be possible to replace them by some other words without altering what Parliament has enacted. I accept what was said by Lord Denning in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[22]: "The main objects which "are 'otherwise' concerned must, I think, be objects that are "akin to charitable objects—have some kindred quality with "charitable objects."

In considering the objects or object of the General Nursing Council one must consider the Act. In considering the substantially similar position of the General Nursing Council for Scotland Lord Clyde said: "If I tried to define the council's purpose in a "single sentence, I should say its object was to raise the standard "of sick-nursing in Great Britain" (*General Nursing Council for Scotland* v. *Inland Revenue Commissioners*[23]). In that case the question was whether the council was a charity. It was held it was not because the objects included a protection of the calling as well as the education of nurses and improvement of nursing. We have not to consider here whether the council is a charity. Even under the first part of the subsection it is sufficient if the main object or objects are charitable. I therefore get little, if any, assistance from the decision in the case cited or from *General Medical Council* v. *Inland Revenue Commissioners*.[24] I think the question here is whether the objects of the council are for the advancement of social welfare, in the somewhat limited sense stated above. If so, it does not matter whether those objects are charitable in the legal sense or not. I would assume the

[22] [1958] 3 W.L.R. 172, 189; [1958] 2 All E.R. 601.

[23] 1929 S.C. 664, 677; 14 T.C. 645, 660.

[24] 97 L.J.K.B. 578.

subsection was framed so that valuation officers could apply it without getting embogged in the technicalities of the law relating to charities.

I would amplify Lord Clyde's statement by reference to the Act. The council has to prescribe the training and experience and to regulate the conduct of examinations to be prescribed. The rules provide for a period of three years' training, for a general register, for a register for mental cases, for children's cases and for fever nurses (S.I. 1951, No. 1372, r. 16). There is a syllabus for the preliminary and final examinations (loc. cit. Schedule III) which shows the width and amount of knowledge required. The council has to approve the institution in which training is to be carried out, apart from State military hospitals. Section 11 provides for the setting up by the Minister of "area "nurse-training committees" which are to prepare and carry out schemes in accordance with any requirements of the council. A person who is not on the register cannot use the name or title of "nurse" with a proviso excepting children's nurses.

In my opinion, the advancement of the care of the sick is an advancement of social welfare within the section. I agree with Danckwerts J. that there is nothing in the section or the English language to indicate that only poor persons are to be regarded as a subject of social welfare. It was, of course, in earlier days the poor who suffered most, from the absence of adequate nursing. I would have thought it clear that the primary object was to promote and improve the art and practice of nursing. It may be that this could have been attained without the privilege to which I have referred being conferred on those on the register. I therefore accept the finding of the Court of Appeal that there are two main objects. This is a public Act and I would have regarded the improvement of nursing as the primary object. I would myself have thought that Parliament improved and protected the status of those who nursed, as a means of improving nursing, but I am prepared to accept this improvement and protection as a main object within the subsection and not as merely subsidiary. I do not get much assistance from the fact that the provisions of the Act can be described as regulating the nursing profession. If a profession is within the social welfare field, its regulation may be the best and only reasons for the advancement of social welfare. It will depend on the nature of the regulation. In the present case, and here I differ from the Court of Appeal, I hold that the enhancement of the status of nurses as provided by the Act is in itself for the advancement of social welfare. Both main objects, therefore, are within the subsection. I would, therefore, allow the appeal.

Appeal dismissed.

Solicitors: *Pontifex, Pitt & Co.; Sharpe, Pritchard & Co.*

F. C.

[COURT OF APPEAL.]

C. A.

1959
Jan. 28, 29.

Hodson and Morris L.JJ.

CADAM AND OTHERS *v.* BEAVERBROOK NEWSPAPERS LTD.

[1958 C. No. 1457.]

Libel and Slander—Libel—Pleadings—Amendment—Newspaper article stating that writ for conspiracy had been issued against named persons—Original defence that words not defamatory—Leave sought to amend defence by adding alternative plea of justification—Supporting particulars limited to repeating statement that writ for conspiracy had been issued—Whether defence as amended should stand—Principles applicable—R.S.C., Ord. 25, *r.* 4.

A newspaper, on March 22, 1957, published an article stating that a writ had been issued against four named persons for alleged conspiracy. The persons named issued a writ a year later claiming that they had been libelled by that article. By their original defence the defendant newspaper owners pleaded that the words did not and could not bear any meaning defamatory of the plaintiffs. Later, they sought leave to amend their defence by adding, by paragraph 5, an alternative plea of justification, supported by particulars which stated merely that "On or about March 20, 1957, "one [P. O.] . . . caused to be issued on his behalf and subsequently "served a writ claiming against the plaintiffs herein damages for "conspiracy to defraud and to deprive the said [P. O.] wrongfully "of his interests and rights in certain limited companies."

Held, that the amended plea of justification, supported by these particulars, should be allowed to stand; for the question whether a plea of justification supported by particulars which did no more than set out the contents of a writ could or did justify any possible defamatory meaning of the words was an arguable question and one for the judge and jury at the trial of the action.

The court should apply to a contested interlocutory application for leave to amend the same principles as those to be applied on an application to strike out pleadings under R.S.C., Ord. 25, r. 4[1]; and, accordingly, the power to refuse amendment should be exercised only in plain and obvious cases.

Per Morris L.J. An appropriate test on such an interlocutory application is to consider whether, if the original defence delivered had been in the amended form, the part added by amendment could have been struck out.

Kemsley v. *Foot* [1951] 2 K.B. 34, 38–39; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331 (C.A.) applied.

Hennessy v. *Wright* (*No.* 3) (1888) 57 L.J.Q.B. 594; 4 T.L.R. 651 considered.

Decision of Paull J. affirmed.

APPEAL from Paull J.

The plaintiffs, John Eugene Cadam, David Daniels, Miss Zena Daniels, and Reginald Noakes issued a writ on April 30, 1958,

[1] R.S.C., Ord. 25, r. 4: "The "court or a judge may order any "pleading to be struck out, on the "ground that it discloses no reason-"able cause of action or answer, and "in any such case or in case of the "action or defence being shown by "the pleadings to be frivolous or "vexatious, the court or a judge may "order the action to be stayed or "dismissed, or judgment to be entered "accordingly, as may be just."

against the defendants, Beaverbrook Newspapers Ltd., owners, printers and publishers of the Daily Express, a daily newspaper with a large circulation, claiming damages for libel contained in an article headed "Zena Daniels Gets a Writ" and published in the issue of the newspaper for March 22, 1957.

The words complained of in the statement of claim were as follows:

"ZENA DANIELS GETS A WRIT. Mr. Percy Oakley, 67-year-old former company director, of Sutton Coldfield, said last night that his solicitor had issued a writ claiming £350,000 damages for alleged conspiracy to deprive him of his interests in certain limited companies. He named: Miss Zena Daniels, the racehorse owner and company director; her father, Mr. David Daniels; Mr. Reginald Noakes . . . Mr. Oakley's former partner; and Mr. John E. Cadam . . . once Mr. Oakley's private secretary. . . . Mr. Oakley said: 'A writ has been issued, and I have been told by my solicitor that it has been served. The companies were: [there followed a list of four companies with there addresses] I was originally managing director of those four companies. Mr. Daniels and Miss Daniels took over by arrangement.'"

The defendants by their original defence delivered on June 17, 1958, admitted publication of the words, but claimed that they did not bear and were incapable of bearing any meaning defamatory of the plaintiffs. A fortnight later, the defendants delivered an amended defence, which by an additional paragraph, paragraph 5, pleaded: "Further or in the alternative the said words are true in substance and in fact." Particulars of that justification were as follows: "On or about March 20, 1957, one Percy Oakley, of Sutton Coldfield, a former company director, caused to be issued on his behalf and subsequently served a writ of this honourable court claiming against the plaintiffs herein damages for conspiracy to defraud and to deprive the said Oakley wrongfully of his interests and rights in certain limited companies."

On receipt of that proposed amended defence, the plaintiffs' solicitors wrote to the defendants' solicitors on August 6, 1958, stating that they had been advised by counsel that as a condition precedent to the grant of leave to amend the plaintiff was entitled to full particulars of the following matters: (*a*) of the facts and matters relied on in support of the allegation that the plaintiffs conspired to defraud the said Percy Oakley; (*b*) of the facts and matters relied on in support of the allegation that they conspired to deprive Oakley of his interests in certain limited companies and identifying such companies; (*c*) of the overt acts alleged to have been done by the plaintiffs in pursuance and/or execution of each of the said conspiracies; and (*d*) of the damage of £350,000 alleged to have been suffered by the said Oakley. The defendants refused to give any further particulars.

The matter came before Master Harwood on a restored hearing of the summons for directions on October 8, 1958, and the master

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refused lease to amend. The defendants appealed to Paull J. in chambers. The judge on November 6, 1958, gave the defendants leave to amend, and in so doing indicated that he approached the plaintiffs' opposition to the application to amend as the equivalent of an application by the plaintiffs to strike out the defence of justification, and that accordingly the same principles should apply as would apply on an application to strike out under the Rules of the Supreme Court. The judge also stated that the proper forum for the plaintiffs' objection to the plea of justification supported by the particulars in the new paragraph 5 was the judge at the trial of the action. Leave to appeal was granted, and the plaintiffs appealed.

Colin Duncan and *Paul Sieghart* for the plaintiffs.
Gerald Gardiner Q.C. and *Helenus Milmo* for the defendants.

The following cases were cited in the course of the argument: *Morris* v. *Sandess Universal Products* [2]; *Birne* v. *National Sporting League* [3]; *Chapman* v. *Ellesmere* [4]; *Park* v. *Detroit Free Press Co.* [5]; *Hubbuck* v. *Wilkinson* [6]; *Dyson* v. *Attorney-General* [7]; *De Crespigny* v. *Wellesley* [8]; *Hennessy* v. *Wright* (*No.* 3) [9]; *Kemsley* v. *Foot* [10]; *MacLeod* v. *Ross* (*Justices of the Peace for Lewis*) [11]; *Broome* v. *Agar* [12]; *London Corporation* v. *Horner.* [13]

Hodson L.J. The appeal is in a pending libel action, and on the assumption that the action has to be tried it is obviously undesirable—and indeed it would be wrong—for this court to express any opinion on any matters which are not strictly necessary for the determination of the appeal.

The order appealed from is an order giving the defendants to the action, Beaverbrook Newspapers Ltd., leave to amend their defence by adding a plea of justification supported by a paragraph containing the particulars of justification. The position is that the four plaintiffs by their writ are claiming damages for libel in an article which appeared on page 7 of the Daily Express of March 22, 1957. The gist of that article was that the four plaintiffs were defendants in an action on a writ claiming damages against them for alleged conspiracy. The article is merely a repetition of the writ. By their defence, the defendants, first of all, said that the words did not bear and were incapable of bearing any meaning defamatory of the plaintiffs, or any of them. The

[2] [1954] 1 W.L.R. 67; [1954] 1 All E.R. 47.
[3] The Times, April 12, 1957.
[4] [1932] 2 K.B. 431; 48 T.L.R. 309.
[5] (1888) 16 American State Reports 544.
[6] [1899] 1 Q.B. 86; 15 T.L.R. 29.
[7] [1911] 1 K.B. 410; 27 T.L.R. 143.
[8] (1829) 5 Bing. 392.
[9] (1888) 57 L.J.Q.B. 594; 4 T.L.R. 548, 651.
[10] [1951] 2 K.B. 34; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331 (C.A.).
[11] (1892) 20 R. 218.
[12] (1928) 44 T.L.R. 339.
[13] (1914) 111 L.T. 512.

defendants had second thoughts, and do not now seek only to rely on the defence that the words to which I have referred are incapable of bearing any meaning defamatory of the plaintiffs, but seek to say in addition that the words are true. It is in this connection that the controversy has arisen.

It is said that leave to amend was rightly refused by the master before whom the matter first came, because the particulars of justification do not justify any defamatory contents of the libel. To put the matter plainly, the particulars of justification merely say: "On or about March 20, 1957, one Percy Oakley of Sutton "Coldfield, a former company director, caused to be issued on "his behalf and subsequently served a writ claiming against the "plaintiffs herein damages for conspiracy to defraud"—the words "to defraud" were not in the original article but appear on the face of the writ—"and to deprive the said Oakley wrongfully of "his interests and rights in certain limited companies." The plaintiffs say that those particulars cannot justify a libel on the footing that the words have a defamatory meaning since the defendants are only saying that they had published defamatory matter which has come from another source.

The principle is: "'Every republication of a libel is a new "'libel and each publisher is answerable for his act to the same "'extent as if the calumny had originated with him.' It is no "defence to an action for such republication that the defendant "received the libellous statement from another whose name he dis-"closed at the time of publication." I am reading Gatley on Libel (4th ed., p. 106). The first sentence is an extract from the judgment of the court in *Morse* v. *Times-Republican Co.*[1] The justification for the second sentence is given as *De Crespigny* v. *Wellesley*,[2] to which we were referred. But, for the reasons indicated at the beginning of my judgment, I do not propose to refer in detail to that case where no question of the administration of justice was concerned, as indeed Best C.J. pointed out.[3] The position, therefore, is that if you choose to repeat a calumny you must take the responsibility for so doing, and if the words are not in themselves defamatory the question of justification does not arise. It is only if the words are defamatory of the plaintiffs that the plea of justification arises, and it is said that the defendants have given no support for that by merely stating that what they have said is derived from a writ.

It is sufficient to say that, although experienced counsel have been engaged on both sides in this case, so far as the court knows there is no authority directly in point. The question seems to me to be open to argument whether, on the footing that the words are capable of being defamatory and are found to be defamatory of the plaintiffs, the defence which is put forward of justification can be supported by a reference to the issue of a writ. The plea

[1] (1904) 124 Iowa Reports 717.
[2] (1829) 5 Bing. 392, 401–402.
[3] Ibid. 405.

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is an alternative plea. There is no embarrassment to the plaintiffs in the alternative plea standing as it is, although, as Mr. Duncan rightly says, in the forefront of this case there will be, as necessarily must be the case in every libel action, the question whether the words bear or are reasonably capable of bearing a defamatory meaning, which is primarily for the judge, though ultimately it may become a question for the jury as to whether the words in fact are defamatory.

I have endeavoured to avoid expressing any view as to what perhaps, on the face of it, may be a somewhat surprising contention of the part of the plaintiffs that merely setting out the contents of the writ and publishing it in the newspaper in circumstances such as these is defamatory. Of course, there may not be any general answer to that question. It may, as Mr. Gardiner submitted, depend on the circumstances of each particular case. It may perhaps depend on the nature of the proceedings.

But these two pleas, the plea of justification and the plea that the words are incapable of bearing a defamatory meaning, are interlocked to some extent, although they will have to be dealt with separately by the judge who directs the jury on this matter.

It is clear to my mind that, on this appeal, the question is not one of merely considering whether the judge has exercised his discretion in the sense that he has, rightly or wrongly, given leave to amend too late, in time, or without imposing any adequate safeguards: the question is whether, as a matter of law, this amended plea, supported by these particulars, ought to be allowed to stand.

The plaintiffs made their position quite clear, because, as soon as the amended plea was submitted to them, they considered it, and asked for particulars of the facts and matters relied on in support of the allegation that the plaintiffs conspired to defraud Percy Oakley; other similar questions were contained in the letter asking for particulars, but those particulars were refused. The defendants, so far as it was possible for them to do so, confined themselves to stating that they were merely relying on the fact that charges had been made and were not purporting to say that there was any substance in those charges. As I see it, the position being that the judge had to decide, as a matter of law, whether this defence ought to be allowed to stand or not, it is the same as if the application before him had been an application to strike out the amended plea. The problem is the same and has to be looked at in the same way.

The relevant rule in considering the matter is R.S.C., Ord. 25, r. 4: "The court or a judge may order any pleading to be struck "out, on the ground that it discloses no reasonable cause of "action or answer, and in any such case or in case of the action "or defence being shown by the pleadings to be frivolous or "vexatious, the court or a judge may order the action to be "stayed or dismissed, or judgment to be entered accordingly, as "may be just." It is agreed on all sides that it is only in plain

cases that the court will act under that rule. Various authorities were referred to, and I will refer to some of the observations made by Somervell L.J. in *Kemsley* v. *Foot*,[4] in which he considered not only R.S.C., Ord. 25, r. 4, but also Order 19, r. 27, which is also concerned with striking out. "The type of case "appropriate for an application under these rules was considered "in, among other cases, *London Corporation* v. *Horner*[5] and "*Hubbuck & Sons* v. *Wilkinson, Heywood & Clark Ltd.*,[6] a "decision of this court. These cases are referred to in the Annual "Practice under R.S.C., Ord. 25, r. 4, and Sir Walter Monckton "at one time submitted that so strict a principle did not apply to "Order 19, r. 27. An examination of the latter case makes it, "I think, clear that, although the application, as here, was under "both rules, it was Order 19, r. 27, which was substantially in "question. The effect of the cases is accurately summarised in "the Annual Practice, and I think applies to both rules. They "should be applied only in plain and obvious cases, and if there "is a point of law which requires serious discussion, an objection "should be taken on the pleadings and the point set down for "argument under Order 25, r. 2."

As counsel pointed out to us in the course of the argument, the difference between the two Orders is that under Order 25, r. 2, a point of law can be ordered and dealt with by the judge, whose decision is subject to appeal, whereas under the provisions of Order 25, r. 4, as contrasted with the provisions of Order 19, r. 27, there is no appeal without leave. That is an indication of the view taken by the courts that it is only in the most obvious cases that this drastic step of striking out can be taken.

We were referred to *Hennessy* v. *Wright*[7]—which I merely refer to in passing to show that I had it in mind—a decision of the Court of Appeal, where a kindred question arose. In that case the question was whether the plaintiff was entitled to the information whether the defendant intended to justify more than one meaning of the words, that is to say, whether the libel was capable of meaning either that a charge had been made against the plaintiff or that a charge had been made and was true. The Court of Appeal confirmed the order which had been made by the Divisional Court that the plaintiff should be given that information. However, as Mr. Duncan rightly says, the only thing that can fairly be said about that case is that no one took the point that there could not be any justification in merely stating that a charge had been made. The matter was not considered by the court. The members of the court were Cotton, Bowen and Fry L.JJ. Cotton L.J. at the end of his judgment said: "I think it will be a sufficient compliance with the order of the "court if the defendant informs the plaintiff whether he

[4] [1951] 2 K.B. 34, 38–39; [1951] 1 T.L.R. 197; [1951] 1 All E.R. 331 (C.A.).

[5] (1914) 111 L.T. 512.

[6] [1899] 1 Q.B. 86; 15 T.L.R. 29.

[7] (1888) 57 L.J.Q.B. 594; 4 T.L.R. 548, 651.

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"intends to say the report is a true one, or whether he intends "to say that the facts charged against the plaintiff are true."[8]

In my view, the course which this court ought to take on such an interlocutory application as this is quite plain, and that is, that the appeal should be dismissed.

MORRIS L.J. I entirely agree. The plaintiffs in this case do not allege that the words "were used in a defamatory sense other "than their ordinary meaning"—I quote the language of R.S.C., Ord. 19, r. 6 (2). It will be for the judge at the hearing to decide whether the words are capable of a defamatory meaning. It will be for the jury to say whether the words in fact do bear a defamatory meaning. The plaintiffs do not specify, and are not obliged to specify, what is the ordinary meaning, or what are the ordinary meanings of the words that they allege. But they say that the words complained of are in their ordinary meaning defamatory.

In a case of this kind it seems to me that leave to amend would normally be given without any difficulty. An appropriate test, in the problem now before us, is to consider whether, if the defence as originally delivered had been in the form for which leave has now been given, the part added by amendment and contained in paragraph 5 could have been struck out. That involves the question whether that paragraph discloses a reasonable answer, or whether it discloses no reasonable answer to the claim. That must involve a submission on the part of the plaintiffs that paragraph 5 could be no answer to any conceivable defamatory meaning which a jury might find. The defendants at this stage do not know what is the ordinary meaning which the plaintiffs ascribe to those words, and they certainly do not know what is the ordinary meaning which a jury might ascribe to those words. It is quite clear that in giving particulars of justification the defendants are bound by the particulars that they have given: they cannot go beyond those particulars.

As I followed the submissions made before us, if it were thought that the words complained of meant that the defendants were saying that the plaintiffs had in fact been guilty of a conspiracy to defraud or deprive Oakley of his interests, the defendants are not by their particulars as delivered saying that they justify that meaning. If the words have some other meaning, could those particulars as delivered possibly justify some other meaning? It is sufficient at this stage to say that at the trial the issues which have been referred to in the very interesting arguments on both sides will have to be debated, and the judge who tries this case will have to give a careful direction to the jury. But this is certainly not the time to express any opinion upon those matters that have been debated. It is certainly not a plain and obvious case. In my judgment, it could not be said

[8] 57 L.J.Q.B. 594, 596.

that these particulars could not justify some conceivable defamatory meaning that somebody might say was the ordinary meaning of those words. I agree that this appeal fails.

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Appeal dismissed.

Solicitors: *Basil Greenby & Co.; Oswald, Hickson, Collier & Co.*

M. M. H.

[HOUSE OF LORDS.]

DAVIE . . . . . APPELLANT;

AND

NEW MERTON BOARD MILLS LTD. AND ANOTHER . . . . . RESPONDENTS.

H. L. (E.)*
1958
Nov. 27; *Dec.* 1, 2, 3, 4.
1959
Jan. 28.

Negligence—Safe system of work—Plant and equipment—Latent defect—Injury to workman's eye caused by tool with latent defect—Tool supplied by reputable supplier—Tool made by reputable makers—Tool negligently made—Employers' liability.

A maintenance fitter was knocking out a metal key by means of a drift and hammer when, at the second blow of the hammer, a particle of metal flew off the head of the drift and into his eye, causing injuries. The drift, which had been provided for his use by his employers, although apparently in good condition, was of excessive hardness, and was, in the circumstancesa a dangerous tool; it had been negligently manufactured by reputable makers, who had sold it to a reputable firm of suppliers who, in turn, had sold it to the employers, whose system of maintenance and inspection was not at fault. The fitter claimed damages for negligence against his employers on the ground that they had supplied him with a defective tool:—

Held, that the employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

Dicta of Lord Wright in *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456, 460; 43 T.L.R. 675 and *Wilsons & Clyde Coal Co. Ltd.* v. *English* [1938] A.C. 57, 80; 53 T.L.R. 944; [1937] 3 All E.R. 628 explained.

Thomson v. *Cremin* [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185 distinguished.

Donnelly v. *Glasgow Corporation,* 1953 S.C. 107 overruled.

Dictum of Lord Herschell in *Smith* v. *Charles Baker & Sons* [1891] A.C. 325, 362; 7 T.L.R. 679 applied.

Mason v. *Williams & Williams Ltd.* [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808 approved.

Decision of the Court of Appeal [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67 affirmed.

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* *Present:* VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD KEITH OF AVONHOLM.

H. L. (E.)
1959
DAVIE v. NEW MERTON BOARD MILLS LTD.

APPEAL from the Court of Appeal (Parker and Pearce L.JJ., Jenkins L.J. dissenting †).

This was an appeal from an order of the Court of Appeal dated November 26, 1957, allowing an appeal by the first respondents, New Merton Board Mills Ltd. (the first defendants), from a judgment of Ashworth J. dated March 14, 1957, whereby he ordered that judgment should be entered in favour of the appellant, James Gibson Davie (the plaintiff), against both the first respondents and the second respondents, Frank Guylee & Son Ltd. (the second defendants), for the sum of £2,030 with costs to be paid as to 60 per cent. by the first respondents and 40 per cent. by the second respondents. The judge held that the first respondents should be indemnified to the extent of 100 per cent. of the amount of the damages by the second respondents. The Court of Appeal allowed the appeal by the first respondents and directed that judgment should be entered for the appellant against the second respondents only and that judgment should be entered for the first respondents against the appellant. The Court of Appeal made consequential orders as to costs the details of which were embodied in its formal order dated November 26, 1957.

The facts are fully set out in the opinion of Viscount Simonds.

Martin Jukes Q.C. and *Malcolm Morris* for the appellant.

R. Marven Everett Q.C. and *H. Tudor Evans* for the first respondents.

The second respondents did not appear and were not represented.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Toronto Power Co. Ltd.* v. *Paskwan* [1]; *Paine* v. *Colne Valley Electricity Supply Co. Ltd.* [2]; *Hodgson* v. *British Arc Welding Co. Ltd.* [3]; *Haseldine* v. *C. A. Daw & Son Ltd.* [4]; *Biddle* v. *Hart* [5]; *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.* [6]; *Waddle* v. *Wallsend Shipping Co. Ltd.* [7]; *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co. Ltd.* [8]; *Marshment* v. *Borgstrom* [9]; *Junor* v. *International Hotel Co. Ltd.* [10]; *Honeywill & Stein Ltd.* v. *Larkin Brothers (London's Commercial Photographers) Ltd.* [11]; *Penny* v. *Wimbledon Urban District Council* [12]; *Donoghue* v. *Stevenson* [13]; *Nicholls* v. *F. Austin (Leyton) Ltd.* [14];

† *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.* [1927] 2 K.B. 456 was not cited to the Court of Appeal.

[1] [1915] A.C. 734.

[2] (1938) 55 T.L.R. 181; [1938] 4 All E.R. 803.

[3] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[4] [1941] 2 K.B. 343; 58 T.L.R. 1; [1941] 3 All E.R. 156.

[5] [1907] 1 K.B. 649; 23 T.L.R. 262.

[6] [1934] A.C. 538; 51 T.L.R. 5.

[7] [1952] 2 Lloyd's Rep. 105.

[8] [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482; [1958] 3 All E.R. 261.

[9] [1942] S.C.R. 374.

[10] (1914) 32 O.L.R. 399.

[11] [1934] 1 K.B. 191; 50 T.L.R. 56.

[12] [1899] 2 Q.B. 72; 15 T.L.R. 348.

[13] [1932] A.C. 562; 48 T.L.R. 494.

[14] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

Winter v. *Cardiff Rural District Council*[15]; *Paris* v. *Stepney Borough Council*[16]; *Barwick* v. *English Joint Stock Bank*[17]; *Lloyd* v. *Grace, Smith & Co.*[18]; *Green* v. *Fibreglass Ltd.*[19]; *Read* v. *J. Lyons & Co. Ltd.*[20]; *Cole* v. *de Trafford (No. 2)*[21]; *Wilson* v. *Tyneside Window Cleaning Co.*[22]; *Taylor* v. *Sims & Sims*[23] and *Cilia* v. *H. M. James & Sons.*[24]

Their Lordships took time for consideration.

January 28, 1959. VISCOUNT SIMONDS. My Lords, this appeal raises a question of far-reaching consequence. The appellant is by trade a maintenance fitter. In March, 1953, in the course of his employment by New Merton Board Mills Ltd., whom I will call "the respondents," at their factory at Merton, he was using a tool known as a drift which had been provided by them. It is a tool which is used for the purpose of separating one piece of metal from another when they have been brought together too tightly to be released by hand. He struck the drift with a hammer, and there is no suggestion that there was anything wrong in what he did or the way he did it. But the result was that a splinter flew off the drift into his left eye and caused such serious injury that he lost all useful vision of that eye.

The appellant accordingly brought the action out of which this appeal arises against his employers and at a later stage joined as defendants the manufacturers of the drift. The following facts were proved or admitted at the trial: (1) That the drift was made by the manufacturers, an old established firm of toolmakers, in the year 1946: (2) That in July, 1946, they had sold it to a company called C. A. Baldwin & Co. Ltd., a reputable firm which sold tools of this kind: (3) That in response to an order for drifts from the respondents, C. A. Baldwin & Co. Ltd. in the same month delivered a supply which included the fatal drift: (4) That between July, 1946, and March, 1953, this drift had been seldom, if ever, used: (5) That the appellant properly took the drift from the respondents' store and that the accident occurred as the result of the second blow that he struck it with a hammer: (6) That the accident was solely due to the excessive hardness of the metal of the head of the drift: (7) That this excessive hardness was due to negligent heat treatment by the manufacturers: (8) That it was in apparently good condition and there was no negligence in the respondents' system of maintenance and inspection: (9) That the respondents bought the drift from a reputable firm of suppliers and paid a reasonable price for it: (10) That no intermediate

[15] [1950] 1 All E.R. 819; 114 J.P. 234.
[16] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[17] (1867) L.R. 2 Ex. 259.
[18] [1912] A.C. 716; 28 T.L.R. 547.
[19] [1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; [1958] 3 All E.R. 521.
[20] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471.
[21] [1918] 2 K.B. 523.
[22] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.
[23] (1942) 167 L.T. 414; 58 T.L.R. 339; [1942] 2 All E.R. 375.
[24] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

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examination of it between the time of its manufacture and the time of its actual use was reasonably to be expected: (11) That it was unreasonable to expect an employer to test a drift for hardness before issuing it to his employee: and (2) That no examination short of a test would have revealed the danger existing in this particular drift.

Some of these findings and admissions were, no doubt, more relevant to the claim against the manufacturers than that against the respondents. So far as the latter are concerned it is sufficient to say that to them the defect in the drift was latent and not to be discovered by any inspection they could reasonably be expected to make.

It is with this background that the question thus stated by Ashworth J., who tried the case, must be examined, namely, whether the respondents are responsible to the appellant because the drift was negligently manufactured by the manufacturers. The learned judge held that they were; the Court of Appeal (Parker and Pearce L.JJ., dissentiente Jenkins L.J.) that they were not. I interpose, for the sake of clarity, that the learned judge held that the manufacturers also were liable on the principle of *Donoghue* v. *Stevenson* [1] and gave judgment against both defendants for £2,030 with orders as to indemnities and costs which need not now be considered, and that the Court of Appeal, allowing an appeal by the present respondents, directed that the judgment for the appellant should be entered against the manufacturers only with consequential orders as to costs. The appellant, not being satisfied with judgment against the manufacturers only, brings this appeal by which he seeks to make his employers also liable. It is possible that he or others have an eye on those far-reaching consequences of which I have spoken. But, at any rate, he is entitled to appeal.

My Lords, in the course of a hearing which lasted many days a great number of authorities were cited. But it appears to me that no cases were cited in which the facts were similar to those now under consideration, except two. These were, first, a case heard by Finnemore J. in 1955 (*Mason* v. *Williams & Williams Ltd.*[2]) in which the learned judge held upon very similar facts that the employers were not liable and did so in a judgment which, if it was not good law, was notably good sense: it appears that the case was heard at the Chester Assizes and he was not embarrassed by the citation of authority. The second case, in which there was by no means the same degree of similarity, was a Scottish case, *Donnelly* v. *Glasgow Corporation*.[3] Here the question was fully argued and the employers were held liable. I defer the further consideration of this case.

Before I turn to the examination of the cases by which it may be supposed that guiding authority is given, I would remind your

[1] [1932] A.C. 562; 48 T.L.R. 494.
[2] [1955] 1 W.L.R. 549; [1955] 1 All E.R. 808.
[3] 1953 S.C. 107.

Lordships that this action was founded in tort. The accident, it was said, was caused by the negligence of the respondents, their servants or agents, and their negligence consisted in this, that they failed to provide a suitable drift which could be hammered safely without the risk of pieces flying off. I have deliberately used the language of the statement of claim which has been repeatedly used in these proceedings. It may be relevant to observe that it is not strictly accurate. The accident occurred not through a failure to supply a suitable drift—a failure that could result in nothing—but through the supply of an unsuitable drift. Therein lay their alleged negligence, and I pause to analyse that allegation. It may mean one of two things. First, it may mean that it was the duty of the respondents to supply suitable drifts: they supplied an unsuitable one: they did not do their duty: therefore they were negligent. This is a bare statement of absolute obligation. But, secondly, it may mean that the supply of an unsuitable drift was due to a want of reasonable care on their part. It must, then, be shown wherein lay the want of reasonable care and at once the question arises, for whose negligence, acts, I suppose, of omission and commission, the employer is liable in the long chain which ends with the supply by him of a tool to his workman but may begin with the delving of the raw material of manufacture in a distant continent. In the case before us the chain is long enough. The respondents were not guilty of any negligence nor was any servant or agent of theirs nor was the reputable firm who supplied the drifts, but at the end of the chain were the manufacturers. The respondents stood in no contractual relation to them: so little connection was there between them that it was long in dispute whether the fatal drift had been manufactured by them and delivered by them to the suppliers. But it is for their negligence in manufacture that the appellant would make the respondents liable. Remembering, my Lords, that the essence of the tort of negligence lies in the failure to take reasonable care, I am constrained to wonder how this thing can be. But it is made clear by the powerful dissenting judgment of Jenkins L.J. that, if such a result cannot commend itself to reason, it yet may find support in authority. I say that it cannot commend itself to reason; for, if indeed it is the law, every man employing another and supplying him with tools for his job acts at his peril: if someone at some time has been careless, then, for any flaw in the tools, it is he who is responsible, be he himself ever so careful. I observe that such a view of the law is usually accompanied by a disclaimer of any idea that an employer warrants the fitness of the tool he supplies and do not find the reconciliation easy.

My Lords, in the consideration of the very numerous cases which may be thought to have some bearing on this matter, two things should be borne in mind. In the first place, in England for the 100 years between the decision in *Priestley* v. *Fowler* [4] and

[4] (1837) 3 M. & W. 1.

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the abolition of the doctrine of common employment, and for a somewhat shorter period in Scotland, the determination to avert, or at least reduce, the consequences of that decision led to a great deal of artificiality and refinement which would have been otherwise unnecessary. The shadow of it is still upon us. But we can at least return to the simple question which is at the bottom of it all: "Has the employer taken reasonable care for the safety of "the workman?", a question which can only be answered in each case by a consideration of all its circumstances. In the second place, it is well to remember that we are dealing with a case of tort. The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment but it can only lead to confusion, if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms. I would venture a third general observation. Just as the law imposes a certain standard of care upon an employer in relation to his workman, so it imposes on the occupier of land a certain standard of care in relation to those who enter on it and in this regard there were refinements which may now be forgotton. It may well be that the standard of reasonable care in both relations is in certain circumstances the same. It may, too, be useful to argue by way of analogy from one to another. But I would deprecate any direct appeal to cases between invitor and invitee for the purpose of determining the measure of responsibility of an employer to his workman. Particularly I think it is inept where the question is as to the liability of the employer for acts of a third party, independent contractor or another, of which he had not, and could not reasonably have had, knowledge. To that I now return, for it is in this case the very heart of the matter.

My Lords, let me remind your Lordships that the respondents are liable (if they are liable) for the accident to the appellant because the manufacturers were careless, and for that carelessness they must assume vicarious responsibility. That is a conclusion, said Jenkins L.J., which the Court of Appeal was constrained on the authorities to adopt. He observed [5] that that did not "entail the substitution of an absolute duty to ensure safety "for the duty of reasonable care enunciated in *Smith* v. *Charles* "*Baker & Sons* [6] and accepted passim by the House of Lords in "*Wilsons & Clyde Coal Co. Ltd.* v. *English.*[7]" "The duty," he said, "remains a duty of reasonable care, but the obligation "to take that degree of care per se or per alios is an absolute "obligation." With great respect to the Lord Justice, I find this a difficult proposition to interpret and apply. If indeed it means that the employer is responsible for lack of care shown by anyone in the long chain to which I referred earlier in this opinion, then it is for practical purposes indistinguishable from the

[5] [1958] 1 Q.B. 210, 236; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67.

[6] [1891] A.C. 325, 362; 7 T.L.R. 679.

[7] [1938] A.C. 57; 53 T.L.R. 944.

standard of absolute obligation which is disclaimed. If it means anything else, if it is necessary to determine who are the alii for whose default the employer is responsible, then the question is once more open. At what stage is the act or omission of a third party something for which the employer is responsible or no longer responsible?

My Lords, I would begin, as did Parker L.J., with a reference to the familiar words of Lord Herschell in *Smith* v. *Charles Baker & Sons*[8] in which he describes the duty of a master at common law as "the duty of taking reasonable care "to provide proper appliances, and to maintain them in a proper "condition, and so to carry on his operations as not to subject "those employed by him to unnecessary risk," words that are important both in prescribing the positive obligation and in negativing by implication anything higher. The content of the duty at common law, thus described by Lord Herschell, must vary according to the circumstances of each case. Its measure remains the same: it is to take reasonable care, and the subject-matter may be such that the taking of reasonable care may fall little short of absolute obligation. I find nothing in the earlier cases, in either the English or Scottish courts, to which our attention was called, that requires any qualification of this statement, though there are dicta which, taken out of their context might appear to do so.

But, my Lords, as I have said, the difficulty arises, not on the primary statement of liability, but upon the question for whom is the employer responsible. Clearly he is responsible for his own acts, and clearly, too, for those of his servants. To them at least the maxims respondeat superior and qui facit per alium facit per se will apply. It is the next step that is difficult. The employer is said to be liable for the acts of his "agents" and, with greater hesitation, for the acts of "independent con-"tractors." My Lords, fortunately we are not troubled here with the word "agent." No one could say that a manufacturer who makes a tool and supplies it to a merchant who in turn sells it to an employer is in any sense an agent of the latter for providing his workman with a tool. Is he then an independent contractor? It is perhaps a striking commentary on the artificiality of this concept that it should for a moment be thought possible to regard as an independent contractor with an employer a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents. It may lead your Lordships to the conclusion that the liability of the employer in such a case can only be sustained if his obligation is absolute. But that ex hypothesi it is not.

How comes it, then, that Jenkins L.J., from whom, like his brethren in the Court of Appeal, I differ with diffidence, was constrained to hold the present respondents liable? I think that it

[8] [1891] A.C. 325, 362.

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was largely due to the observations of Lord Wright and Lord Maugham in *Wilsons'* case.[9] That was a case in which (I cite the words of Lord Macmillan) it fell to this House to consider and accommodate the spheres of operation in the law of master and servant of two competing doctrines, the doctrine of vicarious liability and the doctrine of common employment, according to the former of which a master is responsible for the negligence of his servant acting within the scope of his employment and according to the latter he is not responsible for the negligence of his servant causing injury to a fellow servant. "Which of these two principles," said Lord Macmillan,[10] "is applicable to the present case?" The question at issue was remote from that in the present case. No one now doubts that an employer cannot escape liability by appointing an agent to perform the employer's obligation on his behalf. An attempted departure from this broad principle in *Fanton* v. *Denville*[11] had been rejected by the Lord Justice-Clerk in *Bain* v. *Fife Coal Co. Ltd.*[12] and this was the main subject of debate in *Wilsons'* case.[13] I would reinforce what I have said by referring to almost the first words of Lord President Normand in the same case[14]: "This court was convened," he said, "to consider two general questions on an employer's liability to one of his servants for personal injury. The first and broader question is whether the employer must answer at common law on the principle respondeat superior for a defective system of working negligently provided or permitted to be carried on by a servant to whom the duty of regulating the system of working has been delegated by the employer." That was the only relevant question for decision. It was assumed throughout that the manager whose negligence had caused the accident was a servant of the employer. No question arose either in the Court of Session or in this House who should be regarded as a servant for whose negligence the employer must be held liable. There is an illuminating passage in the judgment of the Lord President.[15] He refers to the judgment of the Lord Justice-Clerk in *Bain*,[16] who there asserted it to be a fundamental doctrine of the law of master and servant that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of those duties. "I agree," said Lord Normand, "with this opinion, subject to the explanation, which is to be gathered from the context, that, when delegation to others is spoken of, it is delegation to servants that is meant." It is legitimate, therefore, to approach *Wilsons'* case[17] with the warning that anything said about the default of any person other than the employer and his servants

[9] [1938] A.C. 57.
[10] Ibid. 75.
[11] [1932] 2 K.B. 309; 48 T.L.R. 433.
[12] 1935 S.C. 681, 693.
[13] [1938] A.C. 57.
[14] 1936 S.C. 883, 894.
[15] Ibid. 901.
[16] 1935 S.C. 681.
[17] [1938] A.C. 57.

cannot be regarded as relevant to the decision. Of the noble and learned Lords who took part in that case I do not think that Lord Atkin or Lord Thankerton or Lord Macmillan said anything, even alio intuitu, which could give suport to the appellant. I turn then to Lord Wright upon whose observations reliance was placed. I repeat that all that was said was in the setting of the current conflict with the doctrine of common employment and I first note that the learned Lord,[18] after referring to "those fundamental "obligations of a contract of employment which lie outside the "doctrine of common employment, and for the performance of "which employers are absolutely responsible" added: "When I "use the word 'absolutely,' I do not mean that employers "warrant the adequacy of plant, or the competence of fellow-"employees, or the propriety of the system of work. The obliga-"tion is fulfilled by the exercise of due care and skill. But it is "not fulfilled by entrusting its fulfilment to employees, even "though selected with due care and skill." It may be doubted what exactly the noble and learned Lord did have in mind when he used the word "absolutely," but it was on a later passage that learned counsel mainly relied. "But in truth," said Lord Wright,[19] "the employer's obligation, as it has been defined by this "House, is personal to the employer, and one to be performed by "the employer per se or per alios. If I may take an analogy or "instance of a similar personal obligation, I note that the Carriage "of Goods by Sea Act, 1924, requires a shipowner to exercise "due diligence or to take reasonable care to provide a seaworthy "ship. The shipowner is almost certainly not an expert naval "architect, engineer, or stevedore. So far as I know it has "never been claimed that this obligation is fulfilled by the ship-"owner taking reasonable care to appoint a competent expert; "the shipowner is absolutely held to the fulfilment of the obliga-"tion. It is the obligation which is personal to him, and not "the performance." The appellant, fastening on these words, applies them by saying that here the employer was under an absolute personal obligation to supply proper tools to the workman which he could not fulfil by purchasing defective tools in the market. I shall endeavour to show that this is, in any case, an illegitimate application of what Lord Wright said. But it must be first observed that the analogy is an unfortunate one, for in the earlier case of *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*,[20] the same learned judge had to construe the same section, and I venture to quote a substantial passage of his judgment because it is very apposite to the present case. After referring to the terms of the Act, the learned judge continued: "The obligation of the carrier "to exercise due diligence to make the ship fit is clearly not "limited to his personal diligence. The carrier . . . must act "by agents or servants . . . The question is: How wide is the

[18] [1938] A.C. 57, 78.
[19] Ibid. 80.
[20] [1927] 2 K.B. 456, 460; 43 T.L.R. 675.

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"category of agents or servants with reference to the obligation "now being considered. It is contended by the plaintiffs that, "as the primary obligation on the carrier is to provide a seaworthy "ship, the carrier cannot delegate any part of that obligation so "as to relieve him of his personal liability, and he must accord-"ingly be accountable for lack of due diligence on the part of the "shipbuilders and their workmen, who are to be deemed to be "his agents, to make the ship seaworthy and fit, and that, there-"fore, the defendants must be held liable for the bad workman-"ship of which I have found the shipbuilder's men guilty . . . "I do not think that this contention is sound." My Lords, I think, with great respect, that when in *Wilsons'* case [21] the learned judge referred to the analogy of the Carriage of Goods by Sea Act, 1924, he did so with an imperfect recollection of what he had himself decided in the earlier case. And, much as I distrust analogies, I would add that there is a striking resemblance between the shipowner who is held not to be liable for the bad workmanship, undiscoverable by him, of the shipbuilder's employees and the employer who claims not to be liable for the bad workmanship, equally undiscoverable, of the employees of the manufacturer who supplied at second hand the tools with which he has provided his workman.

I turn, then, to Lord Maugham. Again I must be allowed to quote at length, for it is almost entirely upon the authority of this case that the appellant relies. "It has already been pointed "out," said Lord Maugham,[22] "that the employers' liability is "discharged by the exercise of due care and skill; and I may be "allowed to point out that it is this circumstance which has led "on occasion to a misapprehension of the true position. An "illustration will demonstrate the mistake. Suppose some new "machinery is necessary in a factory, and the employer is absent "or completely unskilled in such things. He necessarily leaves "the matter to a manager, let us suppose a highly skilled "person, who, however, is negligent in this case. An accident "follows, due to a defect in the machine. If the liability of the "employer is stated as being an obligation to use his best "endeavours to supply and instal good machinery, it may well be "said on his behalf that he left the matter to a highly skilled "man, and it may be asked with force, what more could he do? I "should reply, nothing; but I should add that the premise is incor-"rect. The possessive pronoun 'his' is that which leads to the "error. The proposition would be more correctly stated to be that "his duty is to supply and instal proper machinery so far as care "and skill can secure this result. He can, and often he must, "perform this duty by the employment of an agent who acts on "his behalf; but he then remains liable to the employees unless "the agent has himself used due care and skill in carrying out the "employers' duty." My Lords, it is not necessary to read further. This is the passage on which reliance was placed as

[21] [1938] A.C. 57. [22] Ibid. 87–88.

indicating that, if the proposition was properly stated, the employer was liable for want of skill and care on the part of anyone in the long chain from manufacture of the tool to its use by a workman. I am satisfied that Lord Maugham meant no such thing, and I find this a convenient place to explain what appears to me the fundamental fallacy in the argument. As I have tried to show, the contention, as stated in its first form, that the employer is liable for the acts of himself, his servants and agents and, subject to whatever limitations might be thought fit, independent contractors, could not lead to success in this action: for the manufacturer could not by any legitimate use of language be considered the servant or agent of, or an independent contractor with, the employer who buys his manufactures in the market. It was then sought to reach the same result by a different road. The employer, it was said, was under a duty to take reasonable care to supply his workmen with proper plant and machinery. It was assumed that this included tools such as drifts, and I, too, will, without deciding it, assume it. It was then said that the employer could not escape responsibility by employing a third party, however expert, to do his duty for him. So far, so good. That is what Lord Maugham said, and I agree. But then comes the next step—but I would rather call it a jump, and a jump that would unhorse any rider. Therefore, it was said, the employer is responsible for the defect in goods that he buys in the market, if it can be shown that that defect was due to the want of skill or care on the part of anyone who was concerned in its manufacture. But, my Lords, by what use or misuse of language can the manufacturer be said to be a person to whom the employer delegated a duty which it was for him to perform? How can it be said that it was as the delegate or agent of the employer that the manufacturer failed to exhibit due skill and care? It is, to my mind, clear that he cannot and equally clear that Lord Maugham was not contemplating such a case nor using language which was apt to cover it.

I would now refer to *Donnelly* v. *Glasgow Corporation.*[23] In that case the plaintiffs, the conductor and driver of an omnibus belonging to the defendant corporation, suffered personal injuries through an accident which was due to a defect in the chassis of the omnibus. To their claim for damages the corporation pleaded that the defect was a defect of design for the non-discovery of which they could not be blamed, as they relied and were entitled to rely on the manufacturers and they were not responsible for any lack of care or skill on the part of the latter. This plea was rejected by the Lord Justice-Clerk. The want of care or skill was in that case one step nearer to the employer since there was no intervening supplier, and I note that the learned judge said that, if the position in that case had been that the Corporation had been able to say that neither they nor their suppliers could have discovered the defect by means of any reasonable inspection, the

[23] 1953 S.C. 107.

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defence would be relevant. But, even so, I cannot accept the Lord Justice-Clerk's reasoning as correct. He summed it up in the words [24]: "The supplier and the master are as one." With the greatest respect, this broad generalisation goes too far, for the reasons I have tried to explain.

The case last cited and particularly the words that I have quoted lead me to a point, not indeed necessary to the decision of this appeal, but useful as an illustration of my theme. It was said that an employer might, instead of purchasing tools of a standard design, either from the manufacturer direct or in the market, order them to be made to his own design. If he did so and if they were defective and an accident resulted, it was clear (so the argument ran) that he would be responsible. I agree that he would, if the fault lay in the design and was due to lack of reasonable care or skill on his part. There is no reason why he should not. A more difficult question would arise if the defect was not due to any fault in design (for which the employer was responsible) but to carelessness in workmanship. But that is a far cry from the present case, and recognising, as I do, that in this area of the law there is a borderline of difficult cases, I do not propose to say more than I need. I must, however, refer, since I mentioned it some time since, to a case tried by Finnemore J. at Chester Assizes. No authority having been cited to him, he said [25]: "Employers have to act as reasonable people, they have "to take reasonable care; but if they buy their tools from well-"known makers, such as the second defendants are, they are "entitled to assume that the tools will be proper for the purposes "for which both sides intended them to be used, and not require "daily, weekly or monthly inspection to see if in fact all is well." My Lords, a prolonged examination of the authorities could not have led him to a sounder conclusion.

As I have already said, a large number of authorities were cited to us, many of them relating to the liability of an employer, or more often of an occupier of land, for the default of an independent contractor. It may one day fall to the House to explain and, perhaps, to reconcile these cases. It is not the occasion for that task when the fault lies at the door of one who was not an "independent contractor," however wide a meaning may be given to those words.

One more thing I must say. It was at one time suggested—I do not use a more emphatic word, for learned counsel was rightly discreet in his approach—that the House should take into consideration the fact that possibly or even probably the employer would, but the workman would not, be covered by insurance, and for that reason should be the more ready to fasten upon the employer liability for an accident due neither to his nor to the workman's carelessness. I will only say that this is not a consideration to which your Lordships should give any weight at all in your determination of the rights and obligations of the parties.

[24] 1953 S.C. 107, 122. [25] [1955] 1 W.L.R. 549, 551.

The legislature has thought fit in some circumstances to impose an absolute obligation upon employers. The Factories Acts and the elaborate regulations made under them testify to the care with which the common law has been altered, adjusted and refined in order to give protection and compensation to the workman. It is not the function of a court of law to fasten upon the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie upon him.

For these reasons, therefore, which I will sum up by saying that the claim was against reason, contrary to principle, and barely supported by authority, I would dismiss the appeal with costs.

LORD MORTON OF HENRYTON. My Lords, by his statement of claim in this action the appellant claimed damages for negligence against both respondents. I shall hereafter refer to him as "the "plaintiff" and to the first and second respondents as "the first "and second defendants."

On March 8, 1953, the plaintiff, a maintenance fitter employed by the first defendants at their factory, had occasion to separate two metal parts of a machine. The appropriate tool for this purpose was a tapered bar of metal about one foot long, known as a drift. The proper method of using a drift is to hold the pointed end against the junction of the parts to be separated, and to strike the thick end with a hammer. The plaintiff went to a cupboard containing drifts, provided by the first defendants for the use of their employees, took out a drift and began to work with it; but at the second stroke of the hammer the drift broke, and a piece flew off, struck the plaintiff's left eye and destroyed the sight of it. This drift was made by the second defendants, who are tool makers, at the end of 1946 and was sold by them in the same year to suppliers of tools of this kind, Messrs. Baldwin & Co. Ltd. In July, 1946, the first defendants ordered a supply of drifts from Baldwin & Co. Ltd., and the drifts delivered to them included the drift which has turned out to be defective.

The plaintiff's action was tried by Ashworth J. That learned judge, having stated the history of the matter and the nature of the defect in the drift, found that the servants of the second defendants had been negligent in the heat treatment of the drift. He continued [26]: "The problem of liability must be considered on "the basis that the employers provided for their employee, the "plaintiff, a dangerous tool which had been negligently made by "the second defendants. I consider first the question whether "in these circumstances the employers are liable. In the first "place, it is clear that no negligence can be attributed to any of "the employers' own servants or agents. The drift P.2 was "apparently in good condition and no allegation was or could be "made that the employers' system of maintenance or inspection

[26] [1957] 2 Q.B. 368, 373; [1957] 2 W.L.R. 247; [1957] 2 All E.R. 38.

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"was at fault. Moreover, the employers bought the drift from a "reputable supplier and paid a reasonable price for it. The "problem arises in naked simplicity: are they responsible to the "plaintiff because the drift was negligently manufactured by the "second defendants?"

The learned judge felt constrained by authority to answer the question so posed in the affirmative. He then held that the second defendants were liable to the plaintiff because their servants were negligent in the manufacture of the drift, which was supplied by the second defendants to Messrs. Baldwin & Co. Ltd. in a condition likely to cause danger to anyone using it. He continued [27]: "I also hold that no intermediate examination of "the drift between the time of the manufacture and the time "of its actual use was reasonably to be expected. It seems to "me to be wholly unreasonable to expect an employer to test a "drift for hardness before issuing it to his employee, and no other "examination would have revealed the danger existing in this "particular drift."

I pause to say that it is plain from the judgment of the learned judge that he did not attribute any negligence to the suppliers, Baldwin & Co. Ltd.

The result was that the learned judge gave judgment for the plaintiff against both defendants for £2,030 and costs. The first defendants only appealed from this judgment, and the Court of Appeal, by a majority (Parker and Pearce L.JJ., Jenkins L.J. dissenting) allowed the appeal, and directed judgment to be entered for the plaintiff against the second defendants only.

The plaintiff now appeals to this House, and the question is whether he, having recovered judgment for £2,030 against the makers of the defective tool, can get judgment against his employers, who were in no way guilty of negligence, either by themselves or by their servants or agents. Ashworth J. and Jenkins L.J. felt themselves constrained by authority to hold the first defendants liable, but, in my opinion, there is no authority which constrains your Lordships to arrive at such a result.

At common law a master owes a general duty to his servants to take reasonable care for their safety. The duty, so far as it relates to the providing of appliances for the use of the servants, was defined by Lord Herschell, in terms which have often been quoted, in *Smith* v. *Charles Baker & Sons* [28]: ". . . the duty "of taking reasonable care to provide proper appliances, and to "maintain them in a proper condition . . ."

Counsel for the plaintiff contended that the obligation of the master is to take the degree of care thus defined per se or per alios; that the duty is absolute, and can only be discharged by the master if all reasonable care has in fact been taken to ensure the soundness of the tool. Applying this contention to the present

[27] [1957] 2 Q.B. 368, 380. [28] [1891] A.C. 325, 362.

case, they say truly that reasonable care was not in fact taken by the manufacturers, and contend that this fact is enough to make the employer liable. This contention appears to be, in effect, a contention that every master warrants the safety of every tool or other appliance provided by him for the use of his employees, and is therefore liable if any such appliance turns out to be unsound and an employee sustains injury in consequence. It matters not, say counsel, if the master and his servants or agents have taken all reasonable care to provide proper appliances; if a servant sustains injury because anyone, at any time, has been guilty of a want of reasonable care in regard to the manufacture, maintenance or inspection of the appliances, the master is liable.

My Lords, in my opinion this contention goes far beyond anything warranted by principle or authority. It is well settled that if a master delegates to another this duty to take reasonable care, he is liable for injury caused through the negligence of that person because it is, in the eye of the law, his own negligence. This is sometimes called the doctrine of vicarious liability, but it has never been extended, by any decision binding on this House, to a case where the master has ordered a standard tool from a reputable supplier, and where, as Ashworth J. held, neither the master himself nor any one of his agents or servants has been guilty of any negligence. I would dismiss the appeal, and my conclusion would have been the same if the first defendants had bought this tool directly from the manufacturers, the second defendants. In that case also there would have been no delegation of the master's duty to take reasonable care.

I refrain from any detailed examination of the numerous cases cited in the course of the argument, because I gratefully accept the views expressed, in his survey of the authorities, by my noble and learned friend on the Woolsack. It is, I think, clear that if Ashworth J. and all the members of the Court of Appeal had felt themselves free to express similar views there would have been no difference of opinion between them.

LORD REID. My Lords, the facts of this case are very simple. The appellant was a maintenance fitter employed by the respondents. In the course of his work he was using in a proper manner a wedged-shaped tool called a drift which was supplied to him by the respondents: he was hammering it for the purpose of separating two pieces of metal. A chip flew off it and struck his eye so that he lost the sight of that eye. The drift was not safe for use because it was much too hard and brittle, and the cause of this was negligence of the manufacturers of the drift, or their servants. The respondents had bought the tool from a reputable merchant, who had in turn bought it from the manufacturers. The trial judge, Ashworth J., said [29]: "I also hold that no intermediate examination of the drift between the time of the

[29] [1957] 2 Q.B. 368, 380.

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"manufacture and the time of its actual use was reasonably to "be expected. It seems to me wholly unreasonable to expect an "employer to test a drift for hardness before issuing it to his "employee, and no other examination would have revealed the "danger existing in this particular drift." This finding is not challenged by the appellant.

Accordingly, there was no negligence on the part of the respondents or any of their servants, including the appellant. The appellant's contention is that the respondents are liable to him in damages because of the negligence of the manufacturers or their servants. It is not said that the mere fact that the tool was unsafe and that this caused the accident is enough to make the respondents liable: but it is said that it is enough to make the respondents liable to show that the unsafe condition of the tool was the result of some person's negligence, whether or not there was any relation between the negligent person and the respondents. In some cases the negligent person might be the manufacturer who sold the article direct to the employer. In this case there was no contractual relation between the manufacturer and the respondents, because they bought the tool from a merchant. In other cases the negligent person might be the person who supplied parts or materials to the manufacturer, who in turn incorporated them in the article sold to the employer. In some cases the employer in buying the article might rely on the reputation of the manufacturer. In other cases he might rely on the reputation of the merchant from whom he bought. That is all said to be immaterial: all that matters is that some person somewhere in the chain was negligent, and that that negligence was the cause of the damage.

For this somewhat startling proposition *Wilsons & Clyde Coal Co. Ltd.* v. *English*[30] is said to be authority. Jenkins L.J., who dissented in the Court of Appeal, took that case as the starting point of the discussion and I shall do the same. In that case the accident was caused by failure to provide a reasonably safe system of working. This failure was not known to the board of directors but was known to their servants to whom they had delegated the management of the mine. The company sought to avoid liability on two grounds: first, that an owner not qualified to be a manager is prohibited by statute from taking part in the technical management of the mine, and they therefore had no control over and were not responsible for the actions which were negligent; and secondly, that their servants who were negligent were fellow servants of the victims of the accident and therefore the doctrine of common employment applied. Both these grounds of defence failed. There was no question of the company being liable for the negligence of some person who was not their servant.

I can find nothing in the speeches of Lord Thankerton or Lord Macmillan, or in the opinions in the Court of Session, which were

[30] [1938] A.C. 57.

approved in this house to suggest any intention to deal with the question whether an employer is in any way liable for negligence of any person who is not his servant. The word "agent" is frequently used, but that is because under the Coal Mines Act "agent" is the technical name of the chief servant of the owner, and the company's "agent" was one of their servants who was aware of the defective system. It is true that, in the passage quoted with approval from the opinion of the Lord Justice-Clerk in *Bain* v. *Fife Coal Co. Ltd.*,[31] he speaks of paramount duties being "entrusted by the master to others." But I think that the context makes it clear that by "others" he meant other servants of the employer.

The appellant relies on passages in the speeches of Lord Wright and Lord Maugham. Lord Wright, in dealing with the limitations of the doctrine of common employment, said[32]: "This House held that . . . the statutory duty was personal to "the employer, in this sense, that he was bound to perform it by "himself or by his servants. The same principle, in my opinion, "applies to those fundamental obligations of a contract of "employment which lie outside the doctrine of common employ-"ment, and for the performance of which employers are "absolutely responsible. When I use the word absolutely, I "do not mean that employers warrant the adequacy of plant, "or the competence of fellow-employees, or the propriety of the "system of work. The obligation is fulfilled by the exercise of "due care and skill." Then he continued the discussion of common employment. So far I can see no sign that Lord Wright had any intention of dealing with an employer's liability for negligence of persons who are not his servants. Indeed, in the first sentence which I have quoted he says expressly that a duty "personal to the employer" must be performed "by himself or "by his servants."

The first passage relied on by the appellant begins[33]: "But in "truth the employer's obligation, as it has been defined by this "House, is personal to the employer, and one to be performed by "the employer per se or per alios." Unless he has changed the meaning of "personal to the employer" in the course of two pages, "per alios" here must mean "by his servants." Then follows one of the passages which cause difficulty: "If I may "take an analogy or instance of a similar personal obligation, I "note that the Carriage of Goods by Sea Act, 1924, requires a "shipowner to exercise due diligence or to take reasonable care "to provide a seaworthy ship. The shipowner is almost certainly "not an expert naval achitect, engineer, or stevedore. So far as "I know it has never been claimed that this obligation is fulfilled "by the shipowner taking reasonable care to appoint a competent "expert; the shipowner is absolutely held to the fulfilment of the

[31] 1935 S.C. 681, 693.
[32] [1938] A.C. 57, 78.
[33] Ibid. 80–81.

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"obligation. It is the obligation which is personal to him, and "not the performance."

In the passage which I quoted earlier Lord Wright explained what he meant by "personal obligation" and "absolutely." I do not think that he has changed those meanings here. He was concerned to meet the argument that the owner's obligation is fulfilled merely by delegation to a skilled servant whom he has neither the knowledge nor the power to supervise or control. In choosing this analogy I think that he must have had in mind his own carefully reasoned judgment in *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*,[34] and, reading the words "personal obligation" and "absolutely" in the peculiar sense which he gives to them in his speech in *Wilsons & Clyde*[35] I see no contradiction between this passage and that judgment.

The relevant passages in *Angliss*[36] are too long to quote in full. I am not concerned with whether they are correct in law. I only use them to show what Lord Wright must have had in mind in making this reference to shipowners in *Wilsons & Clyde*.[37] Having pointed out that the carrier's obligation to exercise due diligence is clearly not limited to his personal diligence, and that he must act by agents or servants, which is the phrase employed in the Act, he said[38]: "The question is: How wide is the "category of agents or servants with reference to the obligation "now being considered. It is contended by the plaintiffs that, "as the primary obligation on the carrier is to provide a sea-"worthy ship, the carrier cannot delegate any part of that "obligation so as to relieve him of his personal liability, and he "must accordingly be accountable for lack of due diligence on "the part of the shipbuilders and their workmen, who are to be "deemed to be his agents, to make the ship seaworthy and fit, "and that, therefore, the defendants must be held liable for the "bad workmanship of which I have found the shipbuilder's men "guilty . . . I do not think that this contention is sound . . . "The carrier may not be the owner of the ship, but merely the "charterer; he may not have contracted for the building of "the ship, but merely have purchased her, possibly years after "she has been built. In the two latter cases the builders and "their men cannot possibly be deemed to have been the agents or "servants of the carrier and it is illogical that there should be "such difference in the carrier's obligations merely because he has "bought the ship by the method of contracting with the builders "to build it for him." Lord Wright then pointed out that if the carrier were liable for the bad workmanship of the builders he might equally be liable for bad workmanship of subcontractors or those who supply special articles "which would involve an almost "unlimited retrogression." Then he states his conclusion[39]:

[34] [1927] 2 K.B. 456.
[35] [1938] A.C. 57.
[36] [1927] 2 K.B. 456.
[37] [1938] A.C. 57.
[38] [1927] 2 K.B. 456, 460–461.
[39] Ibid. 461–462.

"He is to be liable for all such duties as appertain to a prudent "and careful carrier acting as such by the servants and agents in "his employment . . . But I do not think in any case that the "carrier can be held guilty of want of due diligence simply be-"cause the builders' employees have put in some bad work which, "though concealed, renders the vessel unfit." Lord Wright's reference in the passage in *Wilsons & Clyde* [40] to naval architect, engineer, or stevedore links up with a passage in *Angliss* [41] which deals with this matter and concludes: "Again, the need of repair-"ing a ship may cast on the carrier a special duty to see, as far as "reasonably possible, by special advisers for whom he is person-"ally responsible, that the repairs adequately make good the "defects."

The rest of Lord Wright's speech confirms me in my view that he had in mind what he had said in *Angliss*.[42] He continues to use the expression "servants and agents." He says [43]: "not "a warranty, but a duty to exercise (by himself and his servants "and agents) all reasonable care." And later he says [44]: "What "is the extent of the duty attaching to the employer? Such a "duty is the employer's personal duty, whether he performs or "can perform it himself, or whether he does not perform it or "cannot perform it save by servants or agents. A failure to "perform such a duty is the employer's personal negligence." At the end of his speech he says that the true rules of law on the subject have been stated by the Lord President and the majority of the Court of Session, and these opinions are in line with what I believe that Lord Wright meant by the passages which I have quoted.

Lord Wright had the nature of the vicarious liability of a shipowner sufficiently in mind to enable him to select this as an appropriate analogy to the vicarious liability of an employer to his servant, and it seems to me impossible that he could at the same time have forgotten his judgment in *Angliss*,[45] and equally impossible that he would have said no more than he did in *Wilsons & Clyde* [46] if he had come to think that his judgment in *Angliss* [47] was wrong. He certainly thought that a master (or a shipowner) would in some cases be vicariously liable for the negligence of a person who was not in law his servant. But he thought that a shipowner would not be vicariously liable for the shipbuilder's negligence: and by parity of reasoning he must have taken the same view about a master's liability in respect of plant which he had purchased. I cannot avoid the conclusion that, if the facts of the present case had been put before him in 1938, he would have decided in favour of the present respondents.

I find Lord Maugham's speech rather more difficult to interpret. Having agreed with the other opinions he only set out, as

[40] [1938] A.C. 57, 81.
[41] [1927] 2 K.B. 456, 462.
[42] [1927] 2 K.B. 456.
[43] [1938] A.C. 57, 81.
[44] Ibid. 83–84.
[45] [1927] 2 K.B. 456.
[46] [1938] A.C. 57.
[47] [1927] 2 K.B. 456.

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he says, to add a few observations, and it would not appear that he intended to lay down some new doctrine. In the first half of his speech he was clearly only dealing with the negligence of a fellow servant. Then there comes the passage which gives rise to difficulty[48]: "It has already been pointed out that the employers' "liability is discharged by the exercise of due care and skill; and I "may be allowed to point out that it is this circumstance which "has led on occasion to a misapprehension of the true position. "An illustration will demonstrate the mistake. Suppose some "new machinery is necessary in a factory, and the employer is "absent or completely unskilled in such things. He necessarily "leaves the matter to a manager, let us suppose a highly skilled "person, who, however, is negligent in this case. An accident "follows, due to a defect in the machine. If the liability of the "employer is stated as being an obligation to use his best "endeavours to supply and instal good machinery, it may well "be said on his behalf that he left the matter to a highly skilled "man, and it may be asked with force, what more could he do? "I should reply, nothing; but I should add that the premise is "incorrect. The possessive pronoun 'his' is that which leads to "the error. The proposition would be more correctly stated to "be that his duty is to supply and instal proper machinery so far "as care and skill can secure this result. He can, and often he "must, perform this duty by the employment of an agent who "acts on his behalf; but he then remains liable to the employees "unless the agent has himself used due care and skill in carrying "out the employers' duty. This has sometimes been expressed "by saying that the duty is personal to the employer; but the "adjective if unexplained is apt to mislead, like the word "'absolute' and the word 'delegate.' The employer can, of "course, and frequently must delegate the performance of any "of his duties to skilled agents; but it would need an altogether "new implied term in the contract between employer and "employee before a court could properly hold that this delegation "has the result of freeing the employer from his liability. This "becomes apparent if we imagine the contract between employer "and workman to be written out in full with all the implied "clauses. There would be, for the reasons given by the Lord "Justice-Clerk in *Bain* v. *Fife Coal Co. Ltd.*,[49] and by your "Lordships, no clause to the effect that the employer was to be "freed from his special obligations to the workmen if he delegated "them to an agent; and in the absence of such a clause the "employer would plainly remain liable if the agent was guilty "of not using proper care and skill, since in the contract law of "Scotland as in England it is impossible to get rid of a liability "towards the other party to the contract without the consent of "that party."

The beginning of this passage, "It has already been pointed

[48] [1938] A.C. 57, 87–88. [49] 1935 S.C. 681.

"out . . . ," must refer to the exercise of due care and skill by servants of the employer because that is all that he had already dealt with. Then his illustration deals with a manager, "let us "suppose a highly skilled person." Again he is dealing with a servant. Then he takes up the argument for the employer: ". . . he left the matter to a highly skilled man, and it may be "asked with force, what more could he do?" He still appears to be referring to the manager. Then comes the sentence so often taken out of its context and quoted alone: "The proposition "would be more correctly stated to be that his duty is to supply "and instal proper machinery so far as care and skill can secure "this result." He may have meant to include care and skill by everyone concerned including the manufacturer, but that does not seem to me very likely because in the very next sentence he speaks of performing the duty by an agent who acts on the master's behalf, and thereafter he continues to speak of an agent. In using the term "agent" he may very well have meant a wider class than merely servants, but I can see no sign that he meant to go beyond persons who could properly be said to have been employed by the master to act on his behalf. It appears to me, therefore, to be at least doubtful whether Lord Maugham would have held an employer vicariously liable for the negligence of a manufacturer from whom he had bought plant or machinery.

Counsel for the appellant did not maintain that he was helped by the earlier English authorities, but he relied on certain Scottish authorities. The earliest was *Baird* v. *Addie*.[50] This case is of interest because it was decided before the rule of common employment was made part of the law of Scotland by this House in 1858 in *Bartonshill Coal Co.* v. *Reid*.[51] A miner was injured by an explosion due to defective ventilation: he sued his employers. They had made a contract with a person not their servant committing to him the care of the ventilation of the mine. The Lord Ordinary said[52]: "The great point of contention now made is, "that if the accident arose from negligence, it was from the "negligence of the contractor, for whom the defenders are not "responsible. . . . The primary obligation being imposed on "the coalmaster, it is clear that if he employers another to fulfil "it, he is liable for any failure or neglect in its fulfilment." He said that the contractor fell to be regarded in the light of a servant: the First Division took the same view. The Lord President (M'Neill) said[53]: "As to the inspection of the works, and the "notice to the pursuer of danger, it was clearly the duty of the "defenders to provide for that; and whoever they devolved it on, "was their servant, so far as concerns the pursuer." I think it may also be useful to quote from the opinion of Lord Ivory in *Nisbett* v. *William Dixon & Co.*[54] (a case relied on in *Baird* v. *Addie*[55]): "This is not the case of one who, being himself

[50] (1854) 16 D. 490.
[51] (1858) 3 Macq.H.L. 266.
[52] (1854) 16 D. 490, 493n.
[53] Ibid. 494.
[54] (1852) 14 D. 973, 981.
[55] 16 D. 490.

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"employed in one trade, calls in the assistance of another, who "exercises a different trade, to do something which lies within "his calling. But it is the case of a party calling in another "to perform a subordinate part of his own trade. Everything "done by the party so called in is done in a subordinate "capacity—on the defenders' premises—under their control—"and in the execution of their own trade." The facts of this case were quite different, but this appears to have been a fuller statement of the principle followed in *Baird* v. *Addie*.[55]

I attach some importance to this case because it shows the lines on which the law was developing before its development was interrupted by the introduction of the rule of common employment. That rule made it necessary to find another basis for the employer's liability, and this was found in the idea of duties personal to the employer. Now that the rule of common employment has gone, it seems to me that, in so far as we are not fettered by binding authorities, we should at least have in mind the older and less artificial line of development.

Next there are two cases in which Lord President Inglis expressed his opinion. In *Ovington* v. *M'Vicar*[56] a workman had been killed by the breaking of a chain. His employer paid damages in settlement of a claim by his relatives, and sought to recover the amount of the damages from the manufacturer of the chain, averring that he was not negligent but that the manufacturer was. Lord Justice-Clerk Inglis (as he then was) said[57]: "The case is put on this simple ground, that the machinery was "defective, and broke, and caused the death of Monaghan. If "that be so, if that is the only ground on which the claim is "made, then there was no liability on the part of the pursuers "to Monaghan's relatives. I entirely concur in the opinion "expressed by Lord Campbell L.C. in the case of *Weems* v. "*Mathieson*[58] that there is no warranty in such a case as this, "and that a defect of machinery, latent and unknown to the "master of a work, which he neither knows, nor is bound to know, "is not sufficient to ground a claim for damages at the instance "of a workman or his relatives. I think there must be some "culpa on the part of the master before he can be made answer-"able for injuries sustained by his workmen." The other members of the Second Division gave similar reasons.

In *Wilson* v. *Merry & Cunningham*[59] the manager of a mine was negligent in having a scaffold erected across a shaft so as to impede ventilation. To avoid the rule of common employment it was argued that this was a case of providing defective apparatus. The Lord President said[60]: "That is not the nature "of this case. If such an argument were sound, that would bring "the case under the rule of a case which your Lordships very well

[55] 16 D. 490.
[56] (1864) 2 M. 1066.
[57] Ibid. 1072–1073.
[58] (1861) 4 Macq.H.L. 215.
[59] (1867) 5 M. 807.
[60] Ibid. 811.

"know, the case of *Weems* v. *Mathieson*,[61] which was decided "in this Division of the court, and afterwards in the House of "Lords, on appeal, and from the principle of which I am by no "means disposed to differ. I think that wherever the master of "a coal-pit, or of any other work, has occasion to purchase and "provide a machine or apparatus to be used by his workpeople, "or for the protection of his workpeople, he is liable for the "insufficiency of that machine or apparatus if it should turn out "to be insufficient. But this is not the providing of a machine "or apparatus at all." It was argued that this showed that the Lord President thought that a master is liable for defective plant whether he or his servants are negligent or not. I do not agree. He was merely making a passing reference to the law applicable in a state of affairs different from that in the case before him, and the scaffold, alleged to be apparatus provided by the master, was obviously defective in that it impeded ventilation. He was not dealing with anything in which there was a latent defect. I think that it is impossible to suppose that he intended to say something different from what he had said in *Ovington* v. *M'Vicar*[62] three years earlier, particularly as he refers to *Weems* v. *Mathieson*[63] in both cases. And in any event, if his words here are to be taken as a complete expression of the law, they mean absolute liability, a position which no one has ever supported. In this House in *Wilson* v. *Merry & Cunningham*[64] Lord Cairns L.C. referred to the master's duty "to furnish them with adequate materials and "resources for the work," and Lord Colonsay[65] referred to "the "failure to provide or supply the means of providing proper "machinery or materials." But for the same reasons I do not think that they intended to say that the master would be liable apart from negligence on the part of his servants, and again if their words were taken literally they would mean absolute liability.

I would also refer to another case of this period, *Paterson* v. *Wallace & Co.*,[66] where Lord Cranworth L.C. said: "It is the "master's duty to be careful that his servant is not induced to "work under a notion that tackle or machinery is staunch and "secure when in fact the master knows, or ought to know, that "it is not so. And if from any negligence in this respect damage "arise, the master is responsible."

Next there was cited the case of *M'Killop* v. *North British Railway Co.*,[67] when Lord M'Laren said with regard to Lord President Inglis's observation in *Wilson* v. *Merry & Cunningham*[68]: ". . . but his Lordship is careful to distinguish this "from the case of machinery or apparatus purchased by the "master and which is of faulty construction, because if injury "results, this he says is the fault of the master, whose business

[61] 4 Macq.H.L. 215.
[62] 2 M. 1066.
[63] 4 Macq.H.L. 215.
[64] (1868) L.R.H.L.Sc. 326, 332.
[65] Ibid. 344.
[66] (1854) 1 Macq.H.L. 748, 751.
[67] (1890) 23 R. 768, 771.
[68] 5 M. 807.

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"it is to provide the apparatus." In *M'Killop's* case [69] there was no latent defect: the danger was obvious. I do not think that Lord M'Laren misunderstood the Lord President. By "the "fault of the master" I think he meant the fault of the master himself and not merely the fault of the negligent servant: he did not mean that providing machinery with a latent defect was the fault of the master.

The next case, *Macdonald* v. *Andrew Wyllie & Son*,[70] affords some support to the appellant. Builders engaged joiners to erect a scaffold. It was defective and it collapsed and one of the builders' workmen was injured. The defect could have been discovered by a skilled man. It was decided that the mere fact that the fault was that of an independent contractor did not absolve the employer from liability to his servant. Lord Moncreiff and the Lord Justice-Clerk thought that the employer would not be liable unless by the exercise of reasonable care he could have discovered the insufficiency. Lord Moncreiff said [71]: "In "order to render him liable there must be proof of fault or negli-"gence on his part or those for whom he is responsible." But Lord Trayner went much further. He said [72]: "If a master buys "a machine, let us say, necessary for the execution of his work, "and gives it to his workman, it is the master's machine, not "the workman's or manufacturer's. If the machine turns out to "be faulty, defective, or otherwise insufficient, the master must "answer for it. He may have his relief against the maker or "manufacturer, but the injured workman has no claim against "the maker of the machine." Lord Young's opinion is not quite so clear: he does say [73]: "In the contract of master and servant, "apart from special stipulations to the contrary, it is implied that "the employer is responsible to his workmen for the condition "of the scaffolding which he has provided for them to work upon, "and that without any reference to the mode employed by him "to erect it." But in an earlier passage he says [73]: "The basis "of this action is that the defender was responsible to the pursuer "for the scaffolding being in a safe condition, of course excluding "the case of some latent defect not discoverable by reasonable "care." So the appellant can claim the support of Lord Trayner and possibly Lord Young, but the other two members of the Division are against him.

I shall also refer to two cases in which Lord Dunedin expressed his opinion. In *R. T. Wood & Co.* v. *Mackay* [74] he said, when Lord President: "The stevedore's liability in the action which "was raised against him rested on his want of inspection—that "is to say, his negligence, and his negligence alone. It did not "rest upon the ground that the rope was de facto unfit. It seems "to me that that proposition is abundantly clear from two circum-"stances. In the first place, it is clear from the undoubted law

[69] 23 R. 768.
[70] (1898) 1 F. 339.
[71] Ibid. 347.
[72] Ibid. 745.
[73] Ibid. 744.
[74] (1906) 8 F. 625, 633–634.

"of *Weems* v. *Mathieson*,[75] which is a House of Lords decision "and cannot be controverted. That case laid down in most clear "terms what has always been considered as law since then, that "as between a workman and his employer it is not enough for the "workman to say that the employer de facto supplied insufficient "material or an insufficient machine. He must show that in "doing so he was guilty of some negligence." And in *Ballard* v. *North British Railway Co.*,[76] a case regularly quoted on res ipsa loquitur, he said: "Thus, there is a class of cases dealing "with injury occurring to a servant owing to defective plant, "which he was obliged to use and which it was the duty of the "employer to supply. In such cases the fact of an accident may "easily be a fact from which you may infer that the plant was "defective, and it will then be upon the employer to show that "the defect was one against which he could not have guarded."

Down to this point there appears to be no case making an employer liable in respect merely of his plant having a latent defect, or in respect of the negligence of any person other than his servant or someone who in the circumstances can be treated as if he were his servant or subordinate. And apart from Lord Trayner's opinion and possibly Lord Young's, I have found no expression of opinion which appears to me to go beyond that. Apparently the principle for which the appellant now contends had never occurred to anyone. But there is a recent case directly in favour of the appellant.

In *Donnelly* v. *Glasgow Corporation*[77] the driver and conductor of an omnibus were injured when it overturned as a result of the breaking of a front spring. The defenders admitted that the chassis was defective but averred that the defect was one which they could not have discovered by any reasonable examination, and that it was due to the negligence of the manufacturers from whom they bought the omnibus and on whose reputation they were entitled to rely, this type of chassis having proved satisfactory for many years. This defence was held to be irrelevant. The Lord Justice-Clerk, with whom Lord Mackay and Lord Patrick concurred, said[78]: "It is admitted by the corporation that the omnibus was defective and they aver that their "suppliers were responsible for the defective condition. But on "this branch of the law a master cannot escape liability to his "servant for defective plant by blaming his agents. The personal "responsibility which the law lays on the master in respect of "plant covers the activities of any person whom the master "employs to provide that plant. The supplier and the master are "as one. If then the supplier erred, the master is saddled with "the results of that error . . . If the position in the present case "had been that the corporation had been able to say that neither "they, nor their suppliers, could have discovered the defect by "means of any reasonable inspection, the defence would be

[75] 4 Macq.H.L. 215.
[76] 1923 S.C.(H.L.) 43, 53.
[77] 1953 S.C. 107.
[78] Ibid. 122.

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"relevant. But, as I have already said, the corporation agree "that the defect was patent to their suppliers, and that in this "branch of the law means that it was patent to them." No authority is referred to but the Second Division were obviously accepting the view of the effect of *Wilsons & Clyde Coal Co. Ltd.* v. *English*[79] which has been prevalent in many quarters. If that view is now held to be wrong, as I think it should be, then this case cannot stand and must be overruled. It cannot stand with *Ovington* v. *M'Vicar.*[80]

I do not propose to examine the English authorities. I think that they lead to the same conclusion. But, even if it were open on the authorities to reach a conclusion in favour of the appellant, I would think such a conclusion to be wrong in principle. A master's duty to his servant with regard to the safety of plant supplied should, I think, be regarded as a part of the law of tort. Vicarious liability is well recognised and I see no difficulty in principle in extending vicarious liability beyond liability for those who are, strictly speaking, servants, but it would, I think, be going far beyond anything reasonable to extend it to cover a case where there was no relationship whatever between the master and the negligent person or his employer at the time when the negligence occurred. Then I take the other possible way of regarding the master's duty. It was common at one time to regard it as depending on the contract of employment, and, indeed, it was this view which was largely responsible for the invention of the rule of common employment. No doubt this view leaves the court much scope, but I think that it has always been recognised that an implied term must at least be reasonable. I could understand that it might be thought reasonable to make the master absolutely liable in certain cases. This has been done extensively by statute. But it seems to me wholly unreasonable to make the master's liability depend on the conduct of the servants of some person who may be a complete stranger.

Finally, I must notice the case of *Thomson* v. *Cremin.*[81] A stevedore's labourer was injured in the hold of a ship while discharging grain at Glasgow. Shifting-boards had been set up in Australia where the grain was loaded, and they had been supported by shores. The man's injury was caused by the fall of one of these shores. He sued both the shipowner and his employer. His action against his employer failed, but he succeeded against the shipowner on the ground that he was an invitee, and that the shipowner had failed in his duty as invitor. There is no necessary connection between the law of invitor and invitee and the law of master and servant, but in the passage chiefly relied on by the appellant Lord Wright referred to *Wilsons & Clyde Coal Co. Ltd.*

[79] [1938] A.C. 57.
[80] 2 M. 1066.
[81] [1956] 1 W.L.R. 103n.; [1953] 2 All E.R. 1185.

v. *English*,[82] and Jenkins L.J. attached importance to *Thomson* v. *Cremin*[83] in his dissenting judgment in the present case.

The shifting-boards had been fixed by independent contractors in Australia, but the shipowner did not make this a ground of defence either in his pleadings or in his case submitted to this House. His case was (first) that there had been no negligence in fixing the boards, (secondly) that he was entitled to rely on a certificate of a government inspector in Australia that regulations had been complied with, and (thirdly) that the cause of the accident was negligence of the other defender, the stevedore.

The case has a curious history. It was decided by this House in 1941, but it was not reported at the time in either the Law Reports, Session Cases, the Scots Law Times or the All England Reports. Probably this was because Lord Simon L.C. said[84]: "The decision in this case turns almost entirely on questions of "fact," and Lord Porter said[85]: "The question to be considered "in the present case is, I think, one of fact rather than of law." It was reported in Lloyd's List Reports, but that may have been because it was of interest to those concerned with shipping. But later it was regarded in some quarters as laying down law of wide general importance.

It is the speech of Lord Wright that has attracted attention. He began by agreeing with the speech of the Lord Chancellor and said that he merely added a few supplementary observations on some general matters of principle which seemed to him to be involved. Then he said that the case fell within the general rule enunciated in *Indermaur* v. *Dames*.[86] There follows the passage chiefly relied on by the appellant[87]: "The duty of the invitor "towards the invitee is, in my opinion, a duty personal to the "former, in the sense that he does not get rid of the obligation by "entrusting its performance to independent contractors. It is "true that the invitor is not an insurer: he warrants, however, "that due care and skill to make the premises reasonably safe "for the invitee have been exercised, whether by himself, his "servants, or agents or by independent contractors whom he "employs to perform his duty. He does not fulfil the warranty "merely by leaving the work to contractors however reputable or "generally competent. His warranty is broken if they fail to "exercise the proper care and skill. This is only an instance of "the general rule which was stated by Lord Blackburn in another "connection in *Dalton* v. *Henry Angus & Co.*,[88] where he distin-"guished the case of what has been called the collateral negli-"gence of a sub-contractor from their negligence in failing to per-"form a duty resting on the principal himself who 'cannot escape "'from the responsibility attaching to him of seeing that duty "'performed by delegating it to a contractor.' Lord Blackburn

[82] [1938] A.C. 57.
[83] [1956] 1 W.L.R. 103n.
[84] Ibid. 107n.
[85] Ibid. 111n.
[86] (1866) L.R. 1 C.P. 274; (1867) L.R. 2 C.P. 311.
[87] [1956] 1 W.L.R. 103n., 110n.
[88] (1881) 6 App.Cas. 740, 829.

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"again enunciated the same principle in *Hughes* v. *Percival*.[89] "More recently this House, again in a different context of fact, "applied this rule in *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[90] "It is always a question of the extent of the duty incurred. In "the present case the invitee is not concerned with the course "which the invitor adopts by way of discharging the duty. He "is entitled when he comes on the invitor's premises to rely "on the warranty that the invitor's duty to him has been per-"formed and to complain if he is injured because the duty has "not been properly performed."

That matter was also referred to by Lord Simon, who said [91]: "The shipowners' responsibility for the safety of the structure is "not indeed absolute, but, on the principle of *Indermaur* v. "*Dames*,[92] he owes to the invitee a duty of adequate care. If "adequate care was not exercised in fitting and securing the "shore, it would be no answer (as the appellant's counsel candidly "admitted) to say that the shipowner employed an independent "contractor at Fremantle to do the work."

I think that it is important to determine just what was decided by this House. The case was decided in favour of the stevedore because of the limited nature of a master's duty to see to the safety of a servant who is working on another person's premises. It was decided against the shipowner because negligence in securing the shore was found as a fact and the House negatived the only two defences on which he sought to rely if there was negligence which caused the accident—first, that he was entitled to rely on the certificate of a government inspector in Australia, and, secondly, that there would have been no danger if the more usual system of discharging grain had been in operation. The shipowner did not seek to avoid liability either in his pleading or in his case submitted to this House or in argument in this House because of the negligence being that of an independent contractor. So there could be no decision of this House on that matter: it was not submitted for decision. Therefore there could be no ratio decidendi, and any observations on that matter must in my view be regarded as obiter dicta. The distinction is not entirely technical, because a judge who has not heard a question argued out before him may be less likely to see the full implications and less likely to be entirely accurate in the language which he uses.

If the shipowner could not establish that the negligent workmanship of the independent contractor was such that it could not have been discovered by due diligence and inspection by himself or his servants, then it is easy to understand why his counsel admitted that he could not rely on the fact that the negligence was that of a contractor. The case would be clearly covered by the principle in *Indermaur* v. *Dames* [92] because he ought to have

[89] (1883) 8 App.Cas. 443, 446.
[90] [1938] A.C. 57.
[91] [1956] 1 W.L.R. 103n., 106n.
[92] L.R. 1 C.P. 274; L.R. 2 C.P. 311.

known about the negligent workmanship. On a cursory examination of the Record of the case I can find no clear indication whether due diligence would have discovered it. But Lord Porter at least must have thought that the shipowner's servants ought to have discovered it, because he said [93]: "To fulfil his contract "he requires stevedores to put out the cargo, and he must safe-"guard them against risks of which he knows or ought to know "and they do not." It was on that statement of the law that he decided the case.

But Lord Wright, having first said that the case fell within the general rule in *Indermaur* v. *Dames*,[94] went on to speak of a warranty by the invitor broken if independent contractors fail to exercise proper care and skill. Lord Wright's language appears to cover a case where a skilled tradesman of repute employed by a householder leaves negligent workmanship so concealed that no reasonable inspection by the householder or by a skilled man employed by him could discover it, and to mean that if an invitee were injured as a result of such negligence the invitor would be liable. I do not propose to discuss whether that can be reconciled with the famous passage from the judgment of Willes J. in *Indermaur* v. *Dames* [95] which has been so often approved. That question must remain to be decided in a case which requires it to be decided. It is sufficient in the present case to say that even if Lord Wright's language be taken literally and even if it were applied to the law of master and servant, it would not help the present appellant, because, using Lord Wright's own language in *Angliss*,[96] the manufacturers in this case "cannot possibly be "deemed to have been the agents or servants" of the respondents.

The conclusion to which I have come is that an employer, besides being liable to his servant for injury caused by the negligence of his own servants, is in some cases liable in respect of the negligence of others. Where, then, is the line to be drawn? On the one hand it appears that an employer is liable for the negligence of an independent contractor whom he has engaged to carry out one of what have been described as his personal duties on his own premises and whose work might normally be done by the employer's own servant—at least if the negligent workmanship is discoverable by reasonable inspection. On the other hand, for the reasons which I have given, I am of opinion that he is not liable for the negligence of the manufacturer of an article which he has bought, provided that he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make. That leaves a wide sphere regarding which it is unnecessary, and it would, I think, be undesirable, to express any opinion here. Various criteria have been suggested and it must be left for the further development of the law to

[93] [1956] 1 W.L.R. 103n., 114n.
[94] L.R. 1 C.P. 274; L.R. 2 C.P. 311.
[95] L.R. 1 C.P. 274, 287.
[96] [1927] 2 K.B. 456.

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determine which is correct. In my judgment this appeal should be dismissed.

LORD TUCKER. My Lords, I had written an opinion in which I endeavoured to analyse in some detail the speeches in the case of *Wilsons and Clyde Coal Co. Ltd.* v. *English*.[97] Since doing so I have read the opinions of my noble and learned friends, Viscount Simonds and Lord Reid, and it would be mere repetition if I were now to travel over the same ground. I will therefore content myself with expressing my agreement with their analyses of that case and their conclusions thereon, and merely add that I can find no justification for interpreting the language used in that case as any authority for extending the responsibility of the employer to cover acts of negligence on the part of anyone who may have constructed his machinery or some part thereof so as to cause a latent defect therein undiscoverable by the employer or his manager or other person entrusted by him with the task of selecting or ordering the required machinery. There is nothing in that case to warrant the inference that any such situation was ever under consideration, nor is there anything in the ratio decidendi (as distinct from some isolated passages taken out of their context) which points to this as a necessary and logical result of that decision.

My Lords, I do not think that the introduction of the independent contractor into this discussion presents any difficulty. It may well be that in some cases the employer may delegate the performance of his obligations in this sphere to someone who is more properly described as a contractor than a servant, but this will not affect the liability of the employer, he will be just as much liable for his negligence as for that of his servant. Such a contractor is entrusted by the employer with the performance of the employer's personal duty. But this does not mean that every person with whom the employer may have entered into some contractual relationship connected with the manufacture or supply of some machinery, appliance or tool which is ultimately used in his business automatically becomes a person entrusted by the employer with the performance of his common law duty. Still less can the negligence of some person with whom the employer has never been in contact contractually or otherwise, or of whom perhaps he has never even heard, be imputed to him.

My Lords, in the absence of some decision of this House binding upon me which compels me to accept what I regard as such a startling and unwarranted extension of the common law, I do not feel it is incumbent upon me to refer to or examine many of the numerous decisions in lower courts cited in the course of argument, none of which, with one exception, do more than contain some observations or dicta which lend some support to the contentions of the appellant. The exception is the case of *Donnelly* v. *Glasgow Corporation*,[98] which, for the reasons which

[97] [1938] A.C. 57. [98] 1953 S.C. 107.

have been already stated by your Lordships, I agree cannot stand and should be overruled.

I should, however, make reference to the decision of this House in the case of *Thomson* v. *Cremin*,[99] which was decided in 1941 but was not reported in the Law Reports until 1956. This was a case of invitor and invitee and I do not consider it necessary to embark on an inquiry into the differences between the duty of an invitor to invitee before the passing of the Occupiers Liability Act, 1957, and those of an employer to his employees, or to seek to reconcile all that was said in that case with other decisions in this House, but references were made by Lord Wright in his speech in that case by way of comparison to *Wilsons & Clyde Coal Co. Ltd.* v. *English*[100] for the purpose of illustrating the impossibility of the employer escaping liability for his common law obligations by entrusting the performance to servants or agents who act negligently. In so doing he referred to these obligations as based upon warranty, whereas in the *Clyde Coal Co.* case[100] he had rejected this as the basis of the duty. Here again I do not think it is necessary for the decision of the present case to seek to reconcile these statements. I can find nothing in *Thomson* v. *Cremin*[101] to negative the interpretation which I have put upon the decision in the *Clyde Coal Co.* case.[102]

In conclusion I would wish to express my agreement with the majority judgments in the Court of Appeal, save that I would not base my decision upon the intervention of the suppliers between the manufacturers and the respondent company. In my view it would have made no difference if the drift had been purchased direct from the manufacturers, who could not be held to be persons entrusted by the respondent company with the performance of their common law duty towards their employees. This is not to say that in some cases an employer may not render himself liable to his servant for injury suffered by him by reason of a faulty specification prepared by the employer for the manufacturer or in cases where the manufactured article may require some inspection or test after delivery.

I derive some satisfaction from the fact that Finnemore J., unhampered by the citation of authority and in the light of common sense and the application of the common law as he understood it, arrived at the same result in *Mason* v. *Williams & Williams Ltd.*[103]

I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, I agree, and would add only one or two observations. As my noble and learned friend on the Woolsack has pointed out, the manufacturer of the faulty drift can in no sense be regarded as an independent contractor entrusted by the plaintiff's employer with performance of the employer's

[99] [1956] 1 W.L.R. 103n.
[100] [1938] A.C. 57.
[101] [1956] 1 W.L.R. 103n.
[102] [1938] A.C. 57.
[103] [1955] 1 W.L.R. 549.

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duty to supply proper and adequate tools for use by his servants. I do not propose to enter into cases of independent contractors, of which there are a number, in which the person instructing the work has been held liable to third parties for negligence in performance of the work which the contractors were employed to do I would only say that the decision of this House in *Thomson* v. *Cremin* [104] has necessarily proceeded on the view that the shipowner was responsible for the condition of the shores fixed to the shifting-boards by the independent contractors in Australia. The contrary was not argued by the appellants' counsel, and it may be that the case is not a binding authority on this House on that point. But on that hypothesis the argument for the appellants in that case was that negligence of the independent contractors was not established by the evidence that the work was passed as satisfactory by a government inspector in Australia, and that the collapse of the shore in question was due to the negligent operations of the stevedores at the port of discharge. That was a case of invitor and invitee and, in my opinion, has little relevance to the present appeal.

Cases concerned with independent contractors did not mark the limit of the argument for the appellant in this appeal. The first reason stated in his case for reversing the order of the Court of Appeal is: "Because the duty owed by a master to "his servant to exercise due care and skill in the provision of "proper appliances for the use of the servant is not fulfilled "when the master obtains for the use of his servants from a "reputable supplier appliances which were in fact negligently "manufactured and defective and the first respondents [the "masters] were therefore guilty of a breach of this duty to the "appellant which caused injury to him." As amplified in argument his counsel stated this proposition thus: "The duty "of the master is to take reasonable care to provide proper "appliances. But the obligation to take that degree of care per "se or per alios is absolute. This obligation can only be dis-"charged by the master if all reasonable care has been taken to "ensure the soundness of the tools. It is not enough that the "master may have entrusted to someone else the taking of all "reasonable care, *or has assumed that someone else had taken*, "or would take, all reasonable care to ensure the soundness of "the tools." The most material words for the purpose of the present case are those which I have italicised.

I can find no support for this submission in the case of *Wilsons & Clyde Coal Co. Ltd.* v. *English.*[105] I agree entirely with my noble and learned friends, Viscount Simonds and Lord Reid, in their analyses of the opinions in that case and could add nothing further. I would say something, however, about some earlier Scottish authority, if only because it seemed to be the keystone on which the appellant's submission rested. His counsel started

[104] [1956] 1 W.L.R. 103n. [105] [1938] A.C. 57.

with a paragraph from Glegg on Reparation (4th ed., p. 384; 3rd ed., p. 380) headed "Duty to Supply Adequate Plant not "Satisfied by Purchase from Reputable Manufacture," and which opened with the proposition: "The obligation upon a "master to use due care in providing sufficient plant is not satis-"fied by obtaining it from a merchant or manufacturer of good "repute." The text of the paragraph (without the heading which was introduced by the editor of the second and third editions) is the same as appeared in the second edition as written by Sheriff Glegg himself and published in 1903. The proposition professes to be supported by a passage from Lord President Inglis's opinion in *Wilson* v. *Merry & Cunningham*.[106] Its only other support would seem to be in the opinion of the Lord Trayner in *Macdonald* v. *Andrew Wyllie & Son*.[107] My noble and learned friend, Lord Reid, has examined these and other Scottish cases and I do not wish to repeat what he has said, with which I agree. I would only add that what Lord President Inglis said was obiter and that I have great difficulty in thinking that he meant it to be taken in the absolute and unqualified sense in which it is being read. He seems to relate his words to the decision of this House in *Weems* v. *Mathieson*,[108] and a reference to that case shows very clearly that the decision turned on direct lack of care and attention by the master, or those for whom he was responsible, for the safety of his servant in the provision of appliances for suspending, and the manner of suspending, a heavy iron cylinder over the workman's head. Although the Lord President at one point uses the word "guarantee,"[109] I am not satisfied that he meant more than that the employer was under a duty to take reasonable means to satisfy himself so far as possible, by inspection or otherwise, that apparatus bought by, or provided for, him was safe for use by his workpeople. If he meant more it would be inconsistent, as my noble and learned friend has pointed out, with what the Lord President when Lord Justice-Clerk said in *Ovington* v. *M'Vicar*.[110] I would further observe that the paragraph relied on from Glegg does not seem to be entirely consistent with an earlier paragraph in the same work under the heading "Proof of Negligence" (2nd ed., p. 415; 3rd ed., p. 364; 4th ed., p. 370), which, in my opinion, more accurately states the true legal position. It is there stated: "The existence of a defect in "plant or appliances is not of itself evidence of fault on the part "of an owner, and is not a ground of liability. In order to recover "damages the injured person must show either that the owner "knew of the existence of the defect, or, what is more usual, that "he neglected to take reasonable precautions to find out whether "a defect existed." This passage is not confined to liability to strangers, as one of the cases cited in support of the proposition—

[106] 5 M. 807, 811.
[107] 1 F. 339.
[108] 4 Macq.H.L. 215.
[109] 5 M. 807, 811.
[110] 2 M. 1066.

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Gavin v. *W. T. Rogers & Co.*[111]—was a case of master and servant.

This statement is, of course, apart from the question of negligence in the doing, or making, of something entrusted by an employer to an independent contractor, involving delegation of the performance of something which the employer is under a duty to do or provide for his workmen. The ambit of the decision in *Wilsons and Clyde Coal Co. Ltd.* v. *English*[112] did not extend beyond delegation of performance of an employer's duty to a servant. The Lord President in the Court of Session was careful to point that out, and Lord Fleming expressly reserved the question of the effect of delegation to an independent contractor. None of their Lordships in the House of Lords referred to delegation to an independent contractor, though Lord Wright may have had it in mind in relation not to a contract of service, but to the exercise of due diligence for the seaworthiness of a vessel in a contract of carriage by sea. In the cases of *W. Angliss & Co.*[113] and *Thomson* v. *Cremin*[114] Lord Wright took the opportunity, by way of illustration, of referring to cases in other relationships where an owner or occupier was unable to escape liability to a third party by delegating performance of some operation to an independent contractor. An observation, however, of Lord Wright in *W. Angliss & Co.*,[115] though not strictly relevant to this case (being made with reference to obligations of a carrier in a contract of carriage by sea), has, I think, some pertinence to the subject-matter of the present appeal. After pointing out that the carrier must act by servants and agents and posing the question,[116] "How wide is the category of agents or servants "with reference to the obligation now being considered" he says with reference to the fault of the shipbuilders[117]: "The carrier "may not be the owner of the ship, but merely the charterer; he "may not have contracted for the building of the ship, but merely "have purchased her, possibly years after she has been built. In "the two latter cases the builders and their men cannot possibly "be deemed to have been the agents or servants of the carrier "and it is illogical that there should be such difference in the "carrier's obligations merely because he has bought the ship by "the method of contracting with the builders to build it for him. "In addition, if the carrier were held liable for the bad workman-"ship of the builders' men, he might equally be held liable for "bad workmanship by the men employed by the various sub-"contractors who supply material for the builders, such as steel-"workers in furnaces and rolling mills, or who supply special "articles such as castings, pumps or proprietary machines, which "would involve an almost unlimited retrogression." These words were spoken with reference to a statutory liability of the

[111] (1889) 17 R. 206.
[112] [1938] A.C. 57.
[113] [1927] 2 K.B. 456.
[114] [1956] 1 W.L.R. 103n.
[115] [1927] 2 K.B. 456.
[116] Ibid. 460.
[117] Ibid. 461.

carrier but they are not so remote from the present case where from one aspect the problem is to delimit a common law obligation of a master to exercise due diligence for the safety of his servants. Granted that in certain circumstances he may be responsible for the negligence of persons who may be described as independent contractors in the performance for him of his common law duties, where does his liability for negligence in the chain of performance end? The answer made by appellant's counsel is, Nowhere, for the only excuse which he accepts is latent defect arising without negligence in manufacture and which could not be discovered by the maker of the instrument in which the defect existed. This need not, and in the present case does not, involve negligence in a chain of delegation and sub-delegation for here there was nothing but a purchase of a tool from a reputable wholesale supplier of tools. For all practical purposes the appellant's case involves that an employer is bound to warrant the sufficiency and safety of the tools used by his servants.

The only case that might support such a contention is *Donnelly* v. *Glasgow Corporation*.[118] The judgment in that case was not a judgment given after a trial but a decision on relevancy. The pursuer had averred (to paraphrase his averments) that the omnibus in question was of defective design, that its springs were liable to break, that this was known to the defenders, that steps in the shape of certain devices should have been taken to minimise the effects of such breakages, that such steps could have been taken by the defenders to minimise these effects and that they did nothing. He further and in any event averred a duty on the defenders "to provide an omnibus in which the pursuer was to "carry out his duties as conductor which was safe and fit for him "to work and travel in and which was properly constructed for "this purpose." The defenders made averments, inter alia, that the accident was due to the fault of the makers of the omnibus. The Lord Ordinary held that these averments of the defenders were irrelevant and should not be admitted to probation and otherwise approved of an issue for jury trial. The defenders reclaimed against the Lord Ordinary's interlocutor and the court refused the reclaiming motion. The Second Division in refusing the reclaiming motion proceeded on a ground different from that taken by the Lord Ordinary. They held that the defenders had a duty to provide safe plant for their servant and could not escape liability for having provided defective plant by blaming the manufacturers of the omnibus. That the Lord Justice-Clerk (with whom Lord Patrick and Lord Mackay concurred) regarded the defenders as saddled with the fault of the manufacturers is clear from a passage where he says[119]: "If the position in the present "case had been that the corporation had been able to say that "neither they nor their suppliers could have discovered the defect "by means of any reasonable inspection, the defence would be

[118] 1953 S.C. 107.

[119] Ibid. 122.

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"relevant. But, as I have already said, the corporation agree "that the defect was patent to their suppliers, and that in this "branch of law means that it was patent to them." No authorities are discussed in the judgment, but it would seem from a reference to the authorities cited by the pursuer's counsel that he was relying on the passage in Glegg, on Lord President Inglis's dicta in *Wilson* v. *Merry & Cunningham*,[120] on *Macdonald* v. *Andrew Wyllie & Son*[121] and on *Wilsons & Clyde Coal Co. Ltd.* v. *English*.[122] Except for the statement in Glegg which, I consider, is vouched by inadequate authority I can find no support for the judgment in *Donnelly*.[123] That case was, in my opinion, on the point in issue wrongly decided. The duty of a master in supplying a servant with plant or material cannot, in my opinion, be placed higher than a duty to exercise reasonable care to see that the plant or material is safe for the purpose for which it is intended and he cannot be liable, except in a proper case of delegated performance, for the negligence of someone other than himself in the provision of that plant or material. I find it unnecessary to consider whether that liability can extend further than one remove in a chain of delegation. Purchase by a master from a wholesale or retail merchant, without more, is not, in my opinion, an instance of delegation. It is performance by the master himself. Casual references may no doubt be found among the authorities to a duty by a master to supply safe plant and material for his servant. These, I think, will be found to be merely shorthand phrases, the fuller content of which may be gathered from the context. I may say, "have a duty not to "run over anyone on the street" when I mean "I have a duty to "exercise reasonable care not to run over anyone on the street."

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *W. H. Thompson; G. P. Rugg & Co.*

F. C.

[120] 5 M. 807.
[121] 1 F. 339.
[122] [1938] A.C. 57.
[123] 1953 S.C. 107.

[QUEEN'S BENCH DIVISION.]

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Dec. 4, 5.
Diplock J.

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Contract—Implied term—Performance dependent on permission of third party—Obtaining of permission solely within power of promisor—Knowledge of parties at time of contract that permission might be needed—Implied warranty by promisor.

Shipping—Charterparty—Implied term—Vessel chartered to load goods from Syrian port and proceed to Algeria—Vessel required special permission to load—Not within knowledge of charterers—Syrian

authorities prohibited export of grain to Algeria—Implied term as to obtaining permission—Time within which to be obtained. Ships' Names—The Nizetti.

By a charterparty dated May 17, 1956, it was agreed that the *S.S. Nizetti* should "proceed to Lattakia [Syria] or so near as she "may safely get" and load a full cargo and then "proceed to one "or two ports in charterers' option out of Phillipeville, Alger or "Oran."

On September 23, 1954, the Syrian legislature, by decree, made certain provisions prohibiting trade with Israel, and as a result vessels which had called at Israeli ports were refused permission to load, although such permission might be granted if their owners offered sufficient guarantees to the authorities against non-repetition of infringements of the boycotting provisions.

During February, 1955, the *Nizetti* discharged cargo at Haifa, Israel. Thereafter she passed through the Suez Canal at least four times and on each occasion the master signed a declaration of future non-co-operation with Israel. At the date of the charterparty the shipowners knew that the *Nizetti* had called at Haifa and that the master had made declarations of future non-co-operation with Israel, but the charterers neither knew nor ought to have known that.

The *Nizetti* arrived at Lattakia under the charterparty on May 28, 1956, but was refused free pratique. On May 30, the master made a declaration of non-co-operation with Israel, but was still refused permission to load. On June 2, the Syrian authorities prohibited the export of grain to Algeria which took effect from June 3. On June 5 the *Nizetti* sailed from Lattakia. The charterers claimed damages alleging breach of the charterparty:—

Held, (1) that, since it lay solely within the power of the shipowners and outside the power of the charterers to obtain the permission to load, a term must be implied in the charterparty, to give business efficacy to the contract, that the shipowners would at least exercise reasonable diligence to obtain the permission.

(2) That, since the shipowners knew but the charterers neither knew nor ought to have known at the date of the charterparty that permission might be needed, there was an implied warranty by the shipowners, not only that they would use due diligence to obtain, but that they would in fact obtain whatever permission was necessary within a reasonable time; what was to be implied in such circumstances was the obligation least onerous on the party upon whom it was imposed which would, nevertheless, give business efficacy to the contract.

Such reasonable time had not expired when the embargo took effect on June 3, 1956; accordingly, the charterers had failed to establish any breach of warranty on the part of the shipowners before the charterparty was frustrated on June 3 by the embargo.

Per curiam. If both parties had known or ought to have known at the date of the charterparty that permission to load might be needed, the only warranty to be implied would have been that the shipowners would use reasonable diligence to obtain the permission.

SPECIAL CASE under section 21 (1) (*b*) of the Arbitration Act, 1950.

The charterers, Compagnie Algerienne de Meunerie, by a charterparty in the "Gencon" form, dated May 17, 1956, chartered from the shipowners, Katana Societa di Navigatione Marittima, S.P.A., the Italian *S.S. Nizetti*, stated to be "now

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"trading and expected ready to load under this charter about "May 24, 1956." It was agreed "That the said vessel shall proceed to Lattakia or so near thereto as she may safely get and lie "always afloat and there load a full and complete cargo of 2,750 "(two thousand seven hundred and fifty) metric tons, 5% more "or less, quantity in master's option to be declared on giving "notice to shippers. Wheat in bulk, charterers to supply up to "5 per cent. of bagged cargo, as demanded by the master for safe "stowage . . . and being so loaded the vessel shall proceed to one "or two ports in charterers' option, out of Philippeville, Alger "or Oran."

Clause 5 of the charterparty read: "Cargo to be loaded, "stowed and trimmed by charterers' stevedores free of expense "to the vessel at the average rate of 800 tons per weather working "day of 24 consecutive hours, Sundays and Holidays excepted. "Time to commence at 2 p.m. if notice of readiness to load is "given before noon and at 8 a.m. next working day if notice given "during office hours after noon. Telegraphic notice to be given "the shippers' agents. . . ."

Clause 11 provided: "Laydays not to commence before May "24 and should the vessel not be ready to load (whether in berth "or not) on or before May 31, 1956, charterers have the option "of cancelling this contract, such option to be declared, if "demanded, at least 48 hours before vessel's expected arrival at "port of loading. . . ."

The following facts were found by the umpire: "On September 23, 1954, the Syrian Legislature by Legislative Decree "No. 68, made certain provisions with regard to the prohibition "of trade with Israel. By an Instruction relating to the application of this Legislative Decree issued by the Syrian Ministry of "National Economy foreign vessels were forbidden to anchor in "Syrian ports if they had previously called at an Israeli port. "Paragraph 2 of the said Instruction provided that a vessel "coming within the scope of this provision would be placed on a "blacklist, and deprived of the right to load or discharge, or to "take on water, fuel, food and other necessities. Paragraph 4 of "the said Instruction stated that the Ministry of National "Economy was empowered to remove vessels from the blacklist "if their owners offered 'sufficient guarantees against non-"'repetition of infringements of the boycotting provisions.'"

"During February, 1955, the *Nizetti* discharged cargo at Haifa "in Israel. Between February, 1955, and the date of the charterparty the vessel passed through the Suez Canal at least four "times without being detained for any substantial period, the "master on each occasion signing a declaration of future non-co-operation with Israel."

"At 1200 hours on May 28, 1956, the vessel anchored in the "roads at Lattakia preparatory to loading under the charterparty, "and at 1500 hours the vessel was moved to a closer anchorage. "Immediately after the vessel had moored a police officer

" examined the vessel's minutes and hatch log-book. The master " was informed that free pratique would not be granted, and was " instructed not to communicate with the shore pending a decision " by the military command of the city. On the following day " the respondents' brokers were informed by the claimants' " brokers of the refusal to grant free pratique and this informa- " tion was conveyed by cable to the respondents. The respon- " dents thereupon cabled to the master instructing him to sign " a declaration of future non-co-operation with Israel. The master " was, however, still forbidden to land and consequently did not " receive this cable, which awaited him at the agents' office. " During the latter part of the same day (May 29, 1956) the " Syrian Government prohibited the export of grain to France " and to French colonies. (This prohibition is hereinafter called " ' the temporary embargo ')."

" On May 30, 1956, the master was permitted to land and " received the respondents' cable of the previous day. He there- " upon made a declaration of non-co-operation with Israel. The " Syrian authorities nevertheless persisted in their refusal to " allow the vessel free pratique. On May 31, 1956, the Syrian " Government relaxed the temporary embargo in favour of vessels " which had already begun to load but the vessel "—that is, the *Nizetti*—" was unable to begin loading since the authorities " maintained their refusal to grant free pratique. On June 2, " 1956, the Syrian Council of Ministers by Decision No. 568 " prohibited the export of grain to Algeria. This prohibition " (which is hereinafter called ' the final embargo ') took effect " from June 3, 1956. On June 5, 1956, the vessel sailed from " Lattakia, after being allowed to take on a quantity of fresh " water and stores."

The umpire further found in paragraph 15 of the case that: " (1) The vessel began the approach voyage to Lattakia in due time " and proceeded there with due dispatch . . . (3) The respondents " and the master acted with reasonable diligence with regard to the " making of the declaration of future non-co-operation with Israel. " (4) On May 28, 1956, and all material times thereafter the claim- " ants were ready, willing and physically capable of shipping a " contractual cargo in accordance with the terms of the charter- " party. They did not at any material time exercise the right of " cancellation provided by clause 11 of the charterparty. (5) If " the vessel had remained at Lattakia after June 5, 1956, it would " not have been possible, by reason of the final embargo which is " still in force,"—that was at the date of the case stated, which was August, 1958—" to load the contractual cargo or any part " thereof on board the vessel for carriage to Algeria within such a " time as would not have frustrated the commercial purpose of " the charterparty. . . . (7) At the time of the negotiation and " execution of the charterparty, the respondents knew that the " vessel had called at an Israeli port during February, 1955, and " they knew or ought to have known of the existence and effect

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"of Legislative Decree No. 68 and of the Instruction relating "thereto. The respondents also knew that on previous occasions "the master had made declarations of future non-co-operation "with Israel. The claimants did not at the time of the negotia- "tion and execution of the charterparty know that the vessel had "called at an Israeli port or that the master had been required to "make the aforesaid declarations. . . . (9) By agreeing that the "vessel should load the contractual cargo at Lattakia the respon- "dents impliedly warranted that the vessel was not at that time "subject to any restriction which would delay or prevent the vessel "loading the said cargo at Lattakia. (10) The non-performance "of the charterparty was a direct consequence of the respondents' "breach of the aforesaid warranty and the respondents are not "entitled to rely upon the final embargo as a frustrating event "which discharged them from performing their obligations under "the charterparty." The umpire found that the charterers were entitled to recover from the shipowners the loss directly occasioned by the breach, which he assessed at £4,573 19s. 7d.

The questions of law for the court were whether, on the facts found and on the true construction of the charterparty, (a) the shipowners committed any breach of their obligations under the charterparty, and (b) the charterers committed any breach of their obligations under the charterparty.

A. A. Mocatta Q.C. and *J. F. Donaldson* for the shipowners.
John Megaw Q.C. and *R. A. MacCrindle* for the charterers.

The following cases, in addition to those referred to in the judgment were cited in argument: *Partabmull Rameshwar* v. *Sethia (K. C.) (1944) Ltd.*[1]; *Peter Cassidy Seed Co. Ltd.* v. *Osuustukkukauppa I.L.*[2]; *Cunningham* v. *Dunn.*[3]

DIPLOCK J. in stating the relevant facts said: The contract also contains the exceptions clause in the "Gencon" form on which the owners claim to rely if necessary. In the view which I take, it is not necessary for them to do so and I do not propose, therefore, to deal with the not inconsiderable difficulties of construction which this clause presents.

It is not clear from the umpire's findings whether the prohibition of anchorage was automatic, subject to the discretionary power of the Ministry to remove it, or whether it only operated when the vessel was placed on the blacklist. But that any prohibition thereunder could be withdrawn as a matter of the Ministry's discretion is clear.

It is not, I think, suggested that the knowledge of the owners of the applicability of the Legislative Decree No. 68 and of the Instruction relating thereto (which I shall refer to as the Syrian law of 1954) was any breach of the warranty contained in the

[1] [1951] 2 All E.R. 352n.
[2] [1954] 2 Ll.L.Rep. 586.
[3] (1878) 3 C.P.D. 443.

words: "expected ready to load under this charter about May 24, "1956," no doubt because, in view of their Suez experience, the expectation on the part of the owners was honestly held and based on reasonable grounds (see *Samuel Sanday & Co.* v. *Keighley, Maxted & Co.*[1]).

While there is a finding that the claimants were ready, willing and physically capable of shipping a contractual cargo in accordance with the terms of the charterparty, it would, on the umpire's findings as to the temporary embargo and the permanent embargo, have been unlawful for them to do so after the latter part of May 29 because the embargo was only suspended in respect of vessels which had already started loading before that date.

[His Lordship continued:] The position, therefore, seems to be that if the *Nizetti* had been allowed to load on arrival she would have been stopped by the temporary embargo late on May 29; loading could have been resumed on May 31, when the temporary embargo was lifted off the ships which had already begun to load and could have continued up to June 2. I take the umpire's findings to mean that in this event she could have loaded a full cargo, but unless she had started to load before the latter part of May 29 she could never lawfully have loaded at all because the temporary embargo was never lifted in respect of vessels which had not started to load before it was imposed.

This is not a case of inadequate documentation which would have been a breach of warranty of seaworthiness (see *Levy* v. *Costerton*[2]), nor is it a case, as it was in *Ciampa* v. *British India Steam Navigation Co. Ltd.*,[3] where the vessel, at the time the charter was fixed, was to the knowledge of the owners, not shared by the charterers, foredoomed to inability to carry the contractual cargo, which would indeed be a breach of the warranty "expected "ready to load."

There is an express finding of fact by the umpire that "if the "final embargo"—that is to say, on the export of grain to France and the French Colonies—"had not been imposed the Syrian "authorities would ultimately have allowed the vessel to load her "cargo within such a time as would not have frustrated the "commercial purpose of the charterparty." What in the event frustrated the charterparty was the imposition of the final embargo on June 3, 1956, which made it unlawful for both charterers and owners to perform their respective duties under the contract, for it is not suggested that the charterers at any time prior to June 2 exercised their contractual right of cancellation under clause 11, or any right which they may have had to treat the charterparty as rescinded for breach of condition on the part of the owners.

The question, therefore, is whether at any time before the beginning of June 3, 1956, the owners were guilty of any breach of warranty and, if so, what damage did that breach cause. It is

[1] (1922) 27 Com.Cas. 296; 38 T.L.R. 561.

[2] (1816) 4 Camp. 390.

[3] [1915] 2 K.B. 774.

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not contended, quite apart from any exceptions clause, that there is an absolute warranty that the vessel will get to Lattakia and there load a full and complete cargo. Such a contention would ignore the words "or so near thereto as she may safely get." It is well settled that this qualification is not limited to physical obstacles. Prohibition of entry into a named place by the authority having jurisdiction in that place, prima facie entitles the owner to rely on the right to proceed to this alternative place. (See *Dahl* v. *Nelson Donkin.*[4])

The charterers are thus driven to rely upon some implied term in the charterparty. Mr. Megaw contends, I think rightly, that the effect of the Syrian Law of 1954 which was in force at the time when the charterparty was entered into was to make the *Nizetti* a vessel of a class which did, or at least might, require permission or licence from the Syrian authorities to load any cargo at Lattakia. Such permission could be obtained only by the shipowners, because, at any rate if the vessel were placed on the blacklist, a guarantee from them that she would not again call at an Israeli port was the condition precedent to such permission being granted. It lay, therefore, solely within the power of the shipowners and outside the power of the charterers to obtain the permission if it should become necessary to give business efficacy to the contract.

In these circumstances there must at least be an implied warranty by the shipowners that they will use reasonable diligence to obtain the necessary permission to load the cargo on the vessel. If the necessity or possible necessity of such permission were known or ought to have been known to both parties when the charterparty was entered into, then I think that the only warranty to be implied would have been that the shipowner would use reasonable diligence to obtain the permission. But there is the finding of fact by the umpire, which I have already read, that the claimants did not at the time of the negotiation and execution of the charterparty know that the vessel had called at an Israeli port, or that the master had been required to make the declaration of non-co-operation. I think it proper to infer from this finding not only that the charterers did not know, but that there was no evidence that they ought to have known, that the *Nizetti* had called at an Israeli port and, therefore, they neither knew nor ought to have known that the *Nizetti* fell into the special category of vessels for which permission might be needed under the relevant Syrian Law of 1954 before it could load any cargo at Lattakia. In the absence of such knowledge on the part of the charterers at the time the charterparty was entered into, I am prepared to hold, although I do not think that any of the cases cited really assists me in this, that there was an implied warranty by the shipowners not merely that they would use due diligence to obtain, but that they would in fact obtain whatever

[4] (1881) 6 App.Cas. 38.

permissions to carry cargoes were necessary under the Syrian Law of 1954 which was in force at the time that the charterparty was entered into and applicable to vessels of the category into which the *Nizetti* as they, the shipowners, knew, but as the charterers neither knew nor ought to have known, fell.

But even if I am prepared to hold that such a warranty is to be implied, there is still a time factor to be considered. What is the period within which the shipowners warrant that any permission to load the *Nizetti* which may be required under the Syrian Law of 1954 shall be obtained? We are dealing here with an implied term, placing on one of the parties obligations not expressed in the contract, and I apprehend that what is to be implied in such circumstances is the obligation least onerous on the party upon whom it is imposed which will, nevertheless, give business efficacy to the contract.

It seems to me that the highest at which the warranty on the part of a shipowner may be put is that he will (a) exercise due diligence to obtain, and (b) will in fact obtain, within a reasonable time, any permission to load the vessel which is required under the Syrian law in force at the time when the charterparty was entered into.

So far as (a) is concerned—that is to say, due diligence—there is the finding of the umpire, to which I have already referred, that "The respondents and the master acted with "reasonable diligence with regard to the making of the declara-"tion of future non-co-operation with Israel," and I think it can legitimately be inferred from the other findings of fact which I have already quoted, that this is tantamount to a finding that the respondents used due diligence to obtain any permission to load the vessel which was required under the Syrian Law of 1954 in force at the time when the charterparty was entered into.

So far as (b) is concerned, the relevant question, in order to see whether there was a breach of warranty by the shipowners before the contract was frustrated, is: What was a reasonable time? The umpire has not specifically applied his mind to this question, understandably enough, because the arguments addressed to him were in a somewhat different form from those which have been addressed to me, as often happens in cases stated. It seems to me, however, that a reasonable time for obtaining the necessary permission—subject, of course, to due diligence being used—must extend to the moment at which the commercial purpose of the charterparty would be frustrated.

What that time is is, no doubt, a mixed question of fact and law. But in so far as it is a question of fact, it is, I think, implicit in the findings of fact that such time had not expired when the final embargo took effect on June 3, 1956; the finding of fact to which I refer being the umpire's finding that ". . . if "the final embargo had not been imposed the Syrian authorities "would ultimately have allowed the vessel to load her cargo "within such a time as would not have frustrated the commercial

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"purpose of the charterparty." In so far as what is a reasonable time is a question of law, I am certainly not prepared to hold that apart from the embargo the contract would already have been frustrated by midnight on June 2, if loading had been prevented by some other cause outside the control of the parties until that date but not of a permanent character.

I may add, although in view of what I have held it does not, I think, matter, that to establish a breach of warranty for which anything but nominal damages would be recoverable the charterers would have to show that a reasonable time for obtaining the permission had expired before "the latter part"—to use the umpire's words—"of May 29," because any permission given under the Syrian Law of 1954 thereafter would have been effective to enable the charterers lawfully to start to load their contractual cargo of grain for Algeria once the temporary embargo had been imposed.

It is no doubt because he recognises that any allowance of a reasonable time after the arrival of the *Nizetti* in Lattakia roads for the shipowners to obtain any necessary permission under the Syrian Law of 1954 would impose grave difficulties in the way of any claim for damages on the part of the charterers that Mr. Megaw contends that the terms of the implied warranty are that the owners warrant that the permission required under the Syrian Law of 1954 will be granted by the time when—apart from any question of necessity to obtain any such permission—the vessel would be ready to present herself for loading. But this is being wise after the event. It does not seem to me that a term so onerous on the shipowner was necessary to give business efficacy to the contract on May 17, 1956, when it was entered into. At that time neither party could foresee that there would or even might be an embargo on the export of wheat from Syria to Algeria, much less that it would be imposed on ships which had not started to load before the latter part of May 29, 1956. And in the absence of such foresight a warranty by the shipowner that he would use due diligence to obtain, and would in fact obtain within a reasonable time, any necessary permission to load the cargo on his vessel would, I think, be considered by each party and by the officious bystander, if present, to be amply sufficient to give business efficacy to the contract.

I hold, therefore, that even if, what be the fact, the *Nizetti* was refused free pratique because she fell within the category of vessels covered by the Syrian Law of 1954, the claimants have failed to establish any breach of warranty on the part of the respondents before the charterparty was frustrated on June 3, 1956, by the coming into effect of the final embargo on the export of grain from Lattakia to Algeria.

But even if I were wrong as to this, there is a further difficulty with which Mr. Megaw is faced, which logically, perhaps, comes first, but which I deal with second because had it been the decisive point in the case I should have had to consider whether

I ought not to remit the case to the umpire for some further elucidation of his findings.

The umpire found in paragraph 15 (6) of the special case: "It was not proved that the vessel was at any material time on "the Syrian blacklist, or that the Syrian authorities refused to "grant the vessel free pratique in exercise of the powers pre-"scribed in the [Syrian Law of 1954]. Upon examining the "vessel's log-book, if not before, the Syrian authorities found out "that the vessel had discharged cargo at Haifa in 1955. They "used this fact as an expedient for delaying the loading of the "vessel until such time as an embargo should come into force. "Although, if the final embargo had not been imposed the Syrian "authorities would ultimately have allowed the vessel to load "her cargo within such a time as would not have frustrated the "commercial purpose of the charterparty, the decisive and/or "efficient and/or effective cause of the non-performance of the "charterparty was the fact that the vessel had discharged cargo "at Haifa in 1955."

The first sentence seems to be saying, quite clearly, that it was not established either that the *Nizetti* required permission to load under the Syrian Law of 1954 or, at any rate, that it was not established that the absence of such permission was the cause of the refusal of free pratique.

Mr. Megaw asked me to read the paragraph as a whole, saying in effect that while there was no direct evidence that free pratique was withheld in the exercise of powers under the Syrian Law of 1954, the umpire has drawn and expressed an inference of fact which he was entitled to draw that the *Nizetti* was in fact refused free pratique under that legislation. This contention is, I think, really based on the absence of any reference in the case stated to any other Syrian law under which free pratique could have been withheld. But the assumption that the Syrian authorities must have acted under some law is based on the further assumption (which I am not prepared to make without evidence) that the rule of law as we know it in England is uniformly applied in Syria. That the umpire made any such assumption is, I think, negatived by his use of the word "expedient." No expedient was necessary if the *Nizetti* was disqualified from obtaining free pratique without permission under the Syrian Law of 1954. All the authorities had to do was to apply that law.

This subparagraph read as a whole seems to me to be consistent and consistent only with a finding that the delay in granting free pratique was a high-handed action taken by the Syrian authorities, no doubt for good political reasons, for which the fact that the vessel had in 1955 discharged cargo in Haifa and not the Syrian Law of 1954 formed the ostensible excuse. If the *Nizetti* had never called at Haifa this ostensible excuse would not have been available, and it may be that the last sentence of the sub-paragraph by the umpire contains a finding by him that in the absence of that ostensible excuse free pratique would not have

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been withheld. But, on any view, would that suffice to enable the charterers to succeed here, for it cannot be suggested that the shipowners warranted that the *Nizetti* had never called at an Israeli port or that she had never done anything which the Syrian authorities might seize upon as an excuse for refusing free pratique, irrespective of any provisions of Syrian law in existence at the date at which the charterparty was entered into?

I do not think that any further light is thrown on the meaning of this subparagraph by the contents of subparagraphs (9) and (10) of paragraph 15. Subparagraph (9) reads: "By agreeing "that the vessel should load the contractual cargo at Lattakia "the respondents impliedly warranted that the vessel was not "at that time subject to any restriction which would delay or "prevent the vessel loading the said cargo at Lattakia." Subparagraph (10) reads: "The non-performance of the charterparty "was a direct consequence of the respondents' breach of the "aforesaid warranty and the respondents are not entitled to rely "upon the final embargo as a frustrating event which discharged "them from performing their obligations under the charterparty. "The claimants are entitled to recover the loss directly occasioned "by the aforesaid breach."

Subparagraph (9) is a finding of law as to an implied warranty which I hold to be wrong, at any rate unless the qualifying words "beyond a reasonable time" are inserted after the word "delay."

Subparagraph (10), I think, merely refers one back to subparagraph (6) to see of what facts the non-performance of the charterparty was the direct consequence, and there "the decisive "and/or efficient and/or effective cause" is expressed in the terms that I have already examined.

The findings are not as clearly expressed as one could have wished. But I think that on analysis their meaning is sufficiently plain, and in any event, having regard to the other ground on which I am prepared to decide this case, no useful purpose would be served to remitting it to the umpire for further elucidation. In criticising certain obscurities in the paragraph to which I have referred I should like, in compensation, to pay tribute to the careful way in which he has set out his findings of fact and the considerations of law in the case.

It is unnecessary for me to decide any of the other questions raised in this case, either as to the applicability of the exceptions clause or as to the measure of damages.

Question (A) is: "Whether upon the facts found and upon "the true construction of the charterparty the respondents com-"mitted any breach of their obligations under the charterparty." The answer to that question is "No."

Question (B) is: "Whether upon the facts found and upon "the true construction of the charterparty the claimants com-"mitted any breach of their obligations under the charterparty." Mr. Mocatta concedes that that question must also be answered in the negative.

The consequences are that neither the claimants nor the respondents shall be entitled to recover any sum by way of damages and that the claimants and the respondents shall bear the costs of the award equally.

The respondents are entitled to judgment accordingly.

Appeal allowed.

Solicitors: *Edward Thompson & Hauser; Ince & Co.*

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[COURT OF APPEAL.]

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[LVC/1200/1957.]

C. A.

1959 *Jan.* 15, 16; *Feb.* 9.

Morris and Sellers L.JJ., Wynn-Parry J.

Estoppel—Per rem judicatam—Rates and rating—Local valuation court—Decision in 1951 *that society be entered on current valuation list as exempt from rates under Scientific Societies Act,* 1843—*Same question arising in* 1956—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48—*Scientific Societies Act,* 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

Rates and Rating—Science or fine art—Exemption—Whether decision of local valuation court on requisite entry in one valuation list res judicata in relation to new valuation list—Whether local valuation court a court of competent jurisdiction—Whether dispute before local valuation court a lis inter partes—Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 40, 41, 44, 48—*Scientific Societies Act,* 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

Section 48 (4) of the Local Government Act, 1948,[1] provides that, on appeal to a local valuation court, the court "shall give such

[1] Local Government Act, 1948, s. 34: "(1) Subject to the provisions "of subsection (3) of this section, a "new valuation list shall be made for "every rating area so as to come into "force— . . . (*b*) inside London, on "the sixth day of April, 1952, and "the periods for which the valuation "lists in force at the date of the "passing of this Act are to remain in "force shall be extended accordingly. . . . (2) Thereafter new "valuation lists shall, subject to the "provisions of subsection (3) of this "section, be made for all rating "areas, whether within or outside "London, so as to come into force on "the first day of April in the following years, that is to say, the year "1957 and each fifth subsequent "year."

S. 48: " . . . (2) The procedure of "local valuation courts shall, subject "to such regulations, if any, as may "be made in that behalf by the "Minister, be such as the court in "question may determine, and every "such court—(*a*) shall, unless the "court otherwise order, on the application of any party to the appeal "and upon being satisfied that the interests of either party would be prejudicially affected, sit in public; "(*b*) may take evidence on oath and "shall have power for that purpose to "administer oaths. (3) On the hearing of an appeal to a local valuation "court—(*a*) the appellant; and (*b*) the

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"directions with respect to the manner in which the hereditament in "question is to be treated in the valuation list as appear to them "to be necessary. . . ."

In 1951 a society made a proposal to delete from the current valuation list a hereditament occupied by it on the ground that it was exempt from payment of rates under section 1 of the Scientific Societies Act, 1843.[2] The valuation officer objected. On appeal to the local valuation court for the area, the court decided that the hereditament was exempt under the Act of 1843, and directed that the list be amended to accord with that decision.

On April 1, 1956, a new valuation list came into force by virtue of statutory directions, and the society's hereditament was entered on that list with gross and rateable values. The society again made a proposal that it be exempt under the Act of 1843. The valuation officer objected. On appeal to the local valuation court for the same area, the court stated that they had in 1951 decided that the society was exempt, and in the absence of evidence adduced by the valuation officer of any variation in the society's constitution and activities since 1951, the court decided that the hereditament be exempt from rates under the Act of 1843.

On the valuation officer's appeal to the Lands Tribunal, the society entered a plea of res judicata, and the tribunal heard the appeal on that preliminary point, but rejected the plea of res judicata. On appeal by the society:—

Held, (1) (a) that section 48 of the Local Government Act, 1948, showed that a local valuation court was not merely an assessing authority but was a court of competent jurdisdiction to decide between the parties whether the society was entitled to exemption under the Act of 1843, and (b) that such a dispute was a lis inter partes; but

(2) (Sellers L.J. dissenting), that the doctrine of res judicata was inapplicable since the issue arising on the new valuation list

"valuation officer, when he is not the "appellant; and (*c*) the owner or "occupier of the hereditament to "which the appeal relates, when he "is not the appellant; and (*d*) the "rating authority for the area in "which the hereditament in question "is situated, when that authority is "not the appellant; and (*e*) in the "case of an appeal against an objec-"tion, the objector, where he is not "one of the persons aforesaid, shall "be entitled to appear and be heard "as parties to the appeal and to "examine any witness before the "court and to call witnesses. (4) "After hearing the persons men-"tioned in the last preceding subsec-"tion, or such of them as desire to "be heard, the local valuation court "shall give such directions with "respect to the manner in which the "hereditament in question is to be "treated in the valuation list as "appear to them to be necessary to "give effect to the contention of the "appellant if and so far as that con-"tention appears to the court to be "well founded, and the valuation "officer shall incorporate in the list "as settled, or, as the case may be, "cause to be made in the list, such "alterations as are necessary to give "effect to those directions. . . ."

[2] Scientific Societies Act, 1843, s. 1: " . . . no person or persons "shall be assessed or rated, or liable "to be assessed or rated, or liable to "pay, to any county, borough, paro-"chial, or other local rates or cesses, "in respect of any land, houses, or "buildings, or parts of houses or "buildings, belonging to any society "instituted for purposes of science, "literature, or the fine arts exclu-"sively, either as tenant or as owner, "and occupied by it for the trans-"action of its business, and for "carrying into effect its purposes, pro-"vided that such society shall be "supported wholly or in part by "annual voluntary contributions, and "shall not, and by its laws may not, "make any dividend, gift, division, "or bonus in money unto or between "any of its members, and provided "also that such society shall obtain "the certificate of the barrister-at-"law or lord-advocate, as hereinafter "mentioned."

of 1956 was a new issue which had to be resolved by a fresh investigation to ascertain whether the society was still within the Act of 1843. The only question which the court in 1951 had jurisdiction to decide was whether an entry should be made in the then valuation list in accordance with the society's proposal; and the force of that decision became spent and exhausted when that list was replaced by a new valuation list prepared in accordance with statutory direction in 1956. The decision of 1951 that the society was within the Act of 1843, though necessary to the decision as to the entry to be made in 1951, could not be conclusive as to any future entries to be made on any future valuation list.

Hoystead v. *Commissioner of Taxation* [1926] A.C. 155 distinguished.

Dicta of Lord Chelmsford in *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* (1866) L.R. 1 Sc. & Div. 17, 22–23, applied.

Per Sellers L.J. dissenting. The only issue—the only res—which arose on the 1956 valuation list was whether or not the society was exempt as a scientific society within the Act of 1843. That issue had already been tried between the same parties in 1951, in the court provided to hear such a dispute, and the matter was res judicata between the parties involved in that dispute unless evidence were adduced to show that the circumstances had changed.

APPEAL on case stated by the Lands Tribunal on a preliminary point of law.

The facts as stated in the decision of the Lands Tribunal (which forms part of the case stated at a later date) were as follows: On July 27, 1951, the Society of Medical Officers of Health, which occupied a hereditament described as offices, 3rd Floor Rooms, 483–486, Tavistock House, South Wing Extension, Tavistock Square, W.C.1, made a proposal under the provisions of the Local Government Act, 1948,[1] "to delete the hereditament "from the valuation list" on the ground that it was "exempt "from payment of rates under the Scientific Societies Act, "1843."[2] Objection was duly made by the then valuation officer and the appeal was duly heard; and on October 24, 1951, a local valuation court for North East London decided that the hereditament was "exempt from rating under the Scientific Societies Act, "1843" and gave directions for the amendment of the valuation list in accordance with that decision. No appeal against that decision was lodged by the valuation officer.

Under section 34 of the Local Government Act, 1948, as amended by the New Valuation Lists (Postponement) Act, 1952, and Orders made thereunder a new valuation list was made, to come into force on April 1, 1956. In the new list so made, the society's hereditament was entered with a gross value of £300 and rateable value £247.

On September 25, 1956, a proposal was made by the society for the alteration of the list by "the exclusion of the heredita- "ment from the valuation list" on the grounds of "exemption "from payment of rates under the Scientific Societies Act, 1843."

[1] See note on p. 377. [2] See note on p. 378.

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Objection was duly made by the valuation officer and on June 13, 1957, the matter came before the local valuation court for North East London which, after hearing the parties, adjourned the hearing, deciding that "the court is satisfied that the question of "exemption of the society on the basis of its memorandum of "association and facts existing in 1951 has already been decided "between these parties and accordingly we are not prepared to "hear the valuation officer's objection unless he can bring "evidence to show some variation in the society's constitution "or activities since 1951."

On June 14, 1957, the solicitor for the valuation officer wrote to the clerk to the local valuation court a letter, which so far as relevant, was in the following terms: ". . . The valuation officer's "case is that the Society of Medical Officers of Health is not "entitled to exemption under the provisions of the Scientific "Societies Act, 1843, in view of its constitution and its activities. "The valuation officer does not contend that any alteration has "been made in the constitution of the society since the earlier "decision of the local valuation court which was given on "October 24, 1951, and he does not suggest that the society now "carries on activities which it did not then carry on. The valua-"tion officer relies on the present constitution of the society and "its present activities and he is not in a position to say whether "the present activities are in any way different from those to "which the court was referred in 1951; whether or not they are "different is, it is submitted, entirely irrelevant.

"The hearing was adjourned to enable the valuation officer "to give evidence of any changes or differences in the society's "activities, but the valuation officer does not wish to take advan-"tage of this. Accordingly in view of the statement made by "the chairman at the close of the proceedings on June 13, all "that will remain for the court to do will be, it seems, to issue a "direction that the hereditament occupied by the society should "be treated as 'exempt.' In these circumstances the court "may not consider it necessary to arrange a further formal "hearing for the purposes of issuing its formal direction and might "prefer to dispense with any further hearing. You will no doubt "let me know the court's wishes in this respect in due course.

"It will, of course, be appreciated that the valuation officer "is in no way withdrawing his notices of objection to the society's "proposals and that it is his present intention to take the case to "the Lands Tribunal."

On June 24, 1957, the local valuation court gave their decision as follows: "Following the views of the court expressed at the "hearing on June 13, 1957, and as a result of a letter received "from the solicitors' office of the Inland Revenue dated June 14, "1957, the court hereby decide and direct that the offices, third "floor rooms, 483–486, Tavistock House, South Wing Extension, "Tavistock Square, be exempt from rating under the provisions "of section 1 of the Scientific Societies Act, 1843."

Notice of appeal to the Lands Tribunal was given by the valuation officer on July 11, 1957, on the following grounds: that the Society of Medical Officers of Health was not entitled to exemption from rates in respect of the hereditament under the provisions of section 1 of the Scientific Societies Act, 1843. In the reply of the society to the statement of case lodged by the valuation officer in pursuance of rule 11 of the Lands Tribunal Rules, 1956 (S.I. 1956 No. 1734), the society set out as a point of law on which they intended to rely at the hearing that: "The "appellant" [valuation officer] "cannot now be heard to say "that the respondent society is not entitled in respect of the said "hereditament to exemption from rating under the provisions of "section 1 of the Scientific Societies Act, 1843, by reason of the "following matters: (*a*) on July 27, 1951, the respondent society "made a proposal for the exclusion of the said hereditament from "payment of rates under the Act of 1843, to which proposal the "appellant gave notice of objection. (*b*) On October 24, 1951, "the local valuation court decided and directed that the heredita-"ment should be exempt from rating under the Act of 1843."

At the hearing it was agreed between counsel for the contending parties and by the chairman of the tribunal (Mr. Erskine Simes Q.C.) that the point of law raised should be dealt with as a preliminary point of law.

Before the Lands Tribunal the general principle of res judicata was formulated in the following terms: "Where a question has "been decided by a court of competent jurisdiction in a lis inter "partes, those parties are estopped from reopening this decision "in any subsequent litigation between the same parties as to the "same question."

For the valuation officer it was contended, first, that proceedings in a local valuation court were not a lis inter partes and that they were analogous to proceedings before income tax commissioners. Secondly it was contended that the proceedings in relation to the 1956 proposal did not relate to the same question as those on the 1951 proposal, since the latter dealt with the appropriate entry to be made in the list then in operation, while the former dealt with the entry to be made in the new list which had been made and came into operation only on April 1, 1956. The contention was reserved that as under section 20 (1) of the Rating and Valuation Act, 1925, for the purpose of every rate, the valuation list as in force at the time when the rate was made was to be conclusive evidence of the several hereditaments included in the list, the proceedings were only effective for the period for which the rate was made. As an alternative submission it was contended that the local valuation court which heard the appeal in 1951 was not a court of competent jurisdiction within the rule because it had no jurisdiction to determine the question raised in 1956, namely, how the hereditament should be entered in the valuation list in force in 1956, the court in 1951

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being concerned only with the way in which the hereditament should be dealt with in the list then in force.

For the society it was contended that the position of the income tax commissioners and the local valuation court were quite different; that the former had themselves to assess the income of the party for a particular year, whereas the local valuation court had under section 48 of the Local Government Act, 1948, to give "such directions with respect to the manner in which the "hereditament in question is to be treated in the valuation list "as appear to them to be necessary to give effect to the conten-"tion of the appellant if and so far as that contention appears to "the court to be well founded" and on the hearing certain persons, including the valuation officer, were entitled to appear and to be heard as parties to the appeal. It was admitted for the society that a question of value could not be res judicata since it did not depend on status but on the circumstances in a particular case at a particular time. But it was contended that a decision on a question of status, depending on the construction of a particular document, was entirely different and could not be re-litigated; that whether the society on the construction of its memorandum of association was entitled to exemption under the Act of 1843 was a question of status; and that the fact that a new list had come into force was irrelevant.

The Lands Tribunal rejected the contention for the valuation officer that there was no lis inter partes in proceedings before the valuation court or that there was any analogy between such a court and the income tax commissioners, on the ground that that was quite inconsistent with the express provisions of section 48 of the Local Government Act, 1948. The local valuation court were not an assessing authority, "merely in the position of "valuers whose proceedings are regulated by statute to enable "them to make an estimate" (*per* Greer L.J. in *Inland Revenue Commissioners* v. *Sneath* [3]) but were by section 48 limited to giving effect to the contention of an appellant if and in so far as that contention appeared to them to be well founded after hearing the parties to the appeal, one of whom was the valuation officer.

But for *Hoystead* v. *Commissioner of Taxation* [4] the tribunal would have felt no doubt that the principle of res judicata could not apply to proceedings in respect of a different valuation list than that in respect of which a decision had been given, for each valuation list was a new list to be in force for a period specified by statute and all proposals and decisions consequent thereon were restricted to the entries appearing in the list for the time being in force. It seemed, therefore, to the tribunal that in 1951 the local valuation court had no jurisdiction to determine what entry should be made in the valuation list which came into force on April 1, 1956, in relation to the appeal hereditament. The tribunal found difficulty in accepting the suggestion for the

[3] [1932] 2 K.B. 362, 385. [4] [1926] A.C. 155.

society that there was a difference between value and status, for unless there had been some change which would affect the value of a hereditament ascertained in accordance with the statutory directions it would seem that a plea of res judicata could be as effective on a question of value as on a question of what had been described as status, since in both cases what had to be done was to construe certain facts in the light of a statutory provision.

The tribunal, however, distinguished *Hoystead's* case [4] on the ground that the statute in question in that case was one which prescribed the method in which an assessment was to be made and it was the method which was called in question again in the subsequent case, whereas in the present case the question was whether the society should be entered in the list which came into force in 1956 with gross and rateable values or as "exempt," and no decision as to how it should be so entered in that list had ever been made. The point at issue in the present case was not dissimilar to that raised in *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* [5] and the dictum of Lord Chelmsford [6]: "It is sufficient to say that the proceeding in the "present case being for a different rate from that upon which "the former judgment proceeded, the cause of action is different "and the plea of res judicata is consequently inapplicable" seemed to the tribunal to apply to a case where there was a different valuation list. The Lands Tribunal was accordingly not prepared to dismiss the valuation officer's appeal on the plea of res judicata.

The question on which the decision of the court was desired was whether on the findings of fact in the case stated the tribunal came to a correct decision in law in rejecting the society's contention.

The society appealed.

D. Tolstoy for the society.

H. J. Phillimore Q.C. and *Patrick Browne* for the valuation officer.

The following cases (the majority of which were also cited to the Lands Tribunal and referred to in its decision) were referred to in the course of argument: *Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* [7]; *Smith* v. *Assessor for Argyllshire* [8]; *Lamont* v. *Dumfriesshire Assessor* [9]; *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill* [10]; *Hoystead* v. *Commissioner of Taxation* [11]; *Inland Revenue Commissioners* v. *Sneath* [12]; *In re Waring* [13]; *New Brunswick Railway*

[4] [1926] A.C. 155.
[5] (1866) L.R. 1 Sc. & Div. 17.
[6] Ibid. 23.
[7] (1866) L.R. 1 Sc. & Div. 17.
[8] (1885) 12 Rettie 905.
[9] (1900) 2 Fraser 610.
[10] [1926] A.C. 94.
[11] [1926] A.C. 155.
[12] [1932] 2 K.B. 362.
[13] [1948] Ch. 221; 64 T.L.R. 147; [1948] 1 All E.R. 257.

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Co. v. *British and French Trust Corporation Ltd.*[14]; *Wakefield Corporation* v. *Cooke*[15]; *Regina* v. *Hutchings*[16]; *Patuck* v. *Lloyd*[17]; *Barratt* v. *Gravesend Assessment Committee*[18]; *Westminster Council* v. *Southern Railway Co.*[19]; *Smith* v. *Lambeth Assessment Committee*[20]; *Robinson Bros. (Brewers) Ltd.* v. *Durham County Assessment Committee*[21]; *North Eastern Railway Co.* v. *Dalton Overseers.*[22]

Cur. adv. vult.

Morris L.J. In the year 1951 the Society of Medical Officers of Health were in occupation of a hereditament at Tavistock House, Tavistock Square, in London. That hereditament was placed on the then existing valuation list. The society claimed to be exempt from the payment of rates. Exemption was claimed on the basis of the provisions of section 1 of the Scientific Societies Act, 1843. [His Lordship read section 1 so far as relevant, and continued:] The society would therefore be exempt from being rated if (a) it was a society instituted for purposes of science, literature or the fine arts exclusively; (b) it occupied the hereditament for the transaction of its business and for carrying into effect its purposes; (c) it was supported wholly or in part by annual voluntary contributions; (d) it did not and could not make any dividend, gift, division or bonus in money to members, and provided that a certain certificate was obtained.

The society proceeded to take the step which was open to it under the procedure laid down by the Local Government Act, 1948. Section 40 (1) of the Act provides as follows: "Any person "who is aggrieved—(*a*) by the inclusion of any hereditament in "the list; or (*b*) by any value ascribed in the list to a heredita-"ment or by any other statement made or omitted to be made in "the list with respect to a hereditament; or (*c*) in the case of a "building or portion of a building occupied in parts, by the "valuation in the list of that building or portion of a building as "a single hereditament, may at any time make a proposal for the "alteration of the list so far as it relates to that hereditament." Subsections (2) and (3) are as follows: "(2) The valuation officer "may at any time make a proposal for any alteration of a valua-"tion list. (3) Any such proposal as is mentioned in the previous "provisions of this section is in this Part of this Act referred to "as 'a proposal'."

Section 41 deals with the proceedings on proposals. Subsection (1) is as follows: "Every proposal must—(*a*) be made in "writing and, except where it is made by the valuation officer,

[14] [1939] A.C. 1; [1938] 4 All E.R. 747.
[15] [1904] A.C. 31; 20 T.L.R. 115.
[16] (1881) 6 Q.B.D. 300.
[17] (1944) 26 T.C. 284.
[18] [1941] 2 K.B. 107; 57 T.L.R. 590; [1941] 2 All E.R. 308.
[19] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.
[20] (1882) 10 Q.B.D. 327.
[21] [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79.
[22] [1898] 2 Q.B. 66; [1900] A.C. 345 (H.L.).

"be served on the valuation officer; (*b*) specify the grounds on "which the proposed alteration is supported; (*c*) comply "with any requirements of any regulations made by the Minister "with respect to the form of proposals and otherwise with "respect to the making thereof." Subsection (4) provides: "Where the proposal is made otherwise than by the valuation "officer, the valuation officer may, within twenty-one days from "the date on which the proposal is served on him, serve on the "maker of the proposal notice in writing of objection to the "proposal." Then by subsection (6): "Where notice of objec-"tion is made and is not unconditionally withdrawn—(*a*) the per-"son making the proposal may, by notice of appeal served within "the time and on the persons hereinafter mentioned, appeal "against the objection to a local valuation court; and (*b*) no "alteration shall be made in the list in pursuance of the proposal "except where notice of appeal is given as aforesaid and then "only either—(i) in pursuance of the directions of a court or "arbitrator given under the subsequent provisions of this Part "of this Act; or (ii) by agreement between all the persons entitled "to be heard on the appeal."

By later legislation, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, certain new subsections were substituted [by Schedule I, Part II] for the original ones, and the present provisions of paragraphs (*b*) and (*c*) of subsection (6) are as follows: "if the proposal was made otherwise than by the "valuation officer, he may, at any time within the period of five "months beginning with the relevant date, give notice in writing "to the person who made the proposal that he objects to the "proposal, and that the said person, if he does not withdraw "the proposal within fourteen days, will be treated as intending "to appeal against the valuation officer's objection to the pro-"posal; (*c*) not less than fourteen nor more than twenty-eight "days after the valuation officer has given a notice under the "last preceding paragraph, he shall, unless the proposal has then "been withdrawn, transmit a copy of the proposal to the clerk "to the appropriate local valuation panel, together with a copy "of the notice under the last preceding paragraph, and of any "notice of objection to the proposal which has been served under "subsection (3) of this section and has not been unconditionally "withdrawn."

The appeal referred to is to a local valuation court. Section 44 (1) in its present form provides as follows: "Local valuation "courts constituted as hereinafter provided shall be convened as "often as may be necessary for the purpose of hearing and deter-"mining appeals under the preceding provisions of this Part of "this Act against draft valuation lists and against objections to "proposals for the alteration of valuation lists." Section 48 deals with the sittings, procedure and powers of local valuation courts. Subsections (2), (3) and (4) are, in their present form, as follows: [His Lordship read the subsections, and continued:]

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The society availed itself of the right to make a proposal. The proposal was "to delete the hereditament from the valuation "list" on the ground that it was "exempt from payment of rates "under the Scientific Societies Act, 1843." The valuation officer objected to the proposal. The resultant appeal, which was the appeal of the society against the objection of the valuation officer, came before the local valuation court for North-East London on October 24, 1951. Their decision was that the hereditament was "exempt from rating under the Scientific Societies Act, 1843." They gave directions that the valuation list should be amended to accord with their decision. The valuation officer could have appealed against that decision to the Lands Tribunal (see the Lands Tribunal Act, 1949), but no appeal was lodged.

It was provided by section 34 (1) and (2) of the Local Government Act, 1948, as follows: "(1) Subject to the provisions of "subsection (3) of this section, a new valuation list shall be made "for every rating area so as to come into force . . . (*b*) inside "London, on the sixth day of April, nineteen hundred and fifty-"two, and the periods for which the valuation lists in force at the "date of the passing of this Act are to remain in force shall be "extended accordingly. . . . (2) Thereafter new valuation lists "shall, subject to the provisions of subsection (3) of this section, "be made for all rating areas, whether within or outside London, "so as to come into force on the first day of April in the following "years, that is to say, the year nineteen hundred and fifty-"seven and each fifth subsequent year."

By virtue of a later Act (the New Valuation Lists (Postponement) Act, 1952), and of Orders made under that Act, the dates laid down by the Act of 1948 were altered. But a new valuation list had to be made which was to come into force on April 1, 1956. A new list was made, and in it was entered the hereditament of the society together with figures of gross value and rateable value of £300 and £247 respectively.

The society claimed that it could still qualify for the exemption given by the Scientific Societies Act, 1843. It is to be observed that a society might qualify for exemption under circumstances existing at one date and might not qualify under circumstances existing at a different date. Accordingly, the society made a proposal on September 25, 1956. That was a proposal for the alteration of the list "by the exclusion of the "hereditament from the valuation list" on the grounds of "exemption from payment of rates under the Scientific Societies "Act, 1843." Strictly speaking, the society could not claim the "exclusion of the hereditament" from the list but could only claim to have it marked as exempt (see rule 22 of the Valuation Lists Rules, 1955 [S.I. 1955, No. 1680]).

The valuation officer made objection to the proposal of the society, and as a result the matter came before the local valuation court on June 13, 1957. It was the appeal of the society against the valuation officer's objection to its proposal. It is important

to see what was the question which was before the court. It was, in effect, whether the society was entitled in respect of the new valuation list to have an entry made that it was exempt from rates. That raised the question whether, in reference to the proposal made by the society in 1956, the facts and circumstances were such that the provisions of section 1 of the Act of 1843 would give exemption.

The society as appellant had the right to begin. But apparently no evidence was given, and the course that was followed was that the court wished the valuation officer to state whether he alleged that the society's constitution or activities were different from what they were in 1951. The court, after hearing the parties, adjourned the hearing, deciding that "the court is "satisfied that the question of exemption of the society on the "basis of its memorandum of association and facts existing in "1951 has already been decided between these parties and, "accordingly, we are not prepared to hear the valuation officer's "objection unless he can bring evidence to show some variation "in the society's constitution or activities since 1951." The solicitor for the valuation officer made his attitude quite clear in a letter written on June 14. It was that the valuation officer did not wish to give evidence to show changes or differences in the society's constitution or activities since 1951. His contention was that in view of the then existing constitution and activities of the society it was not entitled to exemption. But, in view of the statement of the chairman of the court that, unless the valuation officer brought evidence of a variation since 1951, the court were "not prepared to hear the valuation officer's objection," there seemed no purpose in the further attendance of the valuation officer. The relevant parts of the letter are important and read as follows: [His Lordship read the letter set out in the case (supra) and continued:] It does not appear that at that stage the society could make any plea of res judicata. The society had gone to the local valuation court to appeal against the objection of the valuation officer to its proposal to have an entry made in the newly made valuation list to the effect that it was exempt from rates. The society was doubtless in a position to give evidence on the relevant matters, and its case was that it qualified for the exemption given by the Act of 1843. The matter was, in a sense, taken out of its hands by the court.

In the result, the local valuation court gave their decision on June 24, 1957. It was in the following terms: "Following the "views of the court expressed at the hearing on June 13, 1957, "and as a result of a letter received from the solicitor's office of "the Inland Revenue dated June 14, 1957, the court hereby "decide and direct that the offices, 3rd floor rooms, 483–486, "Tavistock House, South Wing Extension, Tavistock Square, be "exempted from rating under the provisions of section 1 of the "Scientific Societies Act, 1843." That decision must have been given on the assumption (though not on the proof) that the

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occupation of the society at the time of their proposal in 1956 was similar to the occupation in 1951, and that other existing facts were similar to those which existed in 1951, and on the basis that the constitution (whether the same as before or not) showed that the society was instituted for purposes of science, literature or the fine arts exclusively.

The valuation officer gave notice of appeal on July 11, 1957. Appeal lay to the Lands Tribunal. It does not seem to me that the right of the valuation officer to appeal can be questioned. Pursuant to the Rules of the Lands Tribunal, 1956 [S.I. 1956, No. 1734], the valuation officer as appellant lodged his case, and the society lodged its reply. In the reply it was stated that the society would rely on a point of law which they formulated as follows: "The appellant cannot now be heard to say that the "respondent society is not entitled in respect of the said heredita-"ment to exemption from rating under the provisions of section 1 "of the Scientific Societies Act, 1843, by reason of the following "matters:—(*a*) On July 27, 1951, the respondent society made a "proposal for the exclusion of the said hereditament from pay-"ment of rates under the said Act of 1843, to which proposal the "appellant gave notice of objection. (*b*) On October 24, 1951, "the local valuation court decided and directed that the said "hereditament should be exempted from rating under the said "Act of 1843." In effect, the society were seeking to preclude the valuation officer from appealing against the decision which the society had secured in their favour.

When the case reached the Lands Tribunal it was agreed by both parties that the tribunal should deal with this contention of the society as a preliminary point. The Lands Tribunal in a careful decision gave its reasons for declining to dismiss the appeal on the plea of res judicata. The Lands Tribunal stated a case for the decision of the Court of Appeal, the question stated being whether on the findings of fact recorded in the decision the Lands Tribunal came to a correct decision in law in rejecting the contention of the society as recorded above.

When the society were before the local valuation court in 1957 they were appellants who were asking for an order in their favour: they had taken the proper initiative, following the procedure laid down in the statutory code, to obtain an entry on a new valuation list in a form to which they submitted that they were entitled. It would not have availed them merely to produce the decision of 1951. The local valuation court in 1951 could not decide, and did not purport to decide, what entry should be made on some future valuation list not then in existence. The court in 1957 had to be satisfied as to the facts existing at the time of the new valuation list, and to consider the position at the date of the society's proposal. The circumstance that the court had decided what the facts were in 1951 did not establish what they would be in 1956. It is, of course, clear that in 1957 the facts could be very speedily and easily ascertained if someone was

prepared to say that they were the same as or similar to those which existed in 1951 when the court had a previous appeal before it. But by whatever method the facts are ascertained in 1957, the court, in 1957, after having ascertained the facts, was giving its decision on the question as to what entry should be made in the new valuation list. What was decided in 1951 was as to what entry should or should not be made in the valuation list then existing. A decision then made on that question cannot preclude the court from giving whatever it considers to be the correct decision on a later question which later arises, namely, what entry should be made in a later list on the basis of the facts and circumstances later existing. If by the date of the later hearing the superior courts have given guidance on points of law, it would be wrong not to follow such guidance.

The underlying principle supporting a plea of res judicata is that it is desirable that litigation should end, and that it is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided. It has, however, always been clear that the plea will only avail if it appears that there is an attempt to reopen the very matter that has been decided. (Compare *In re Koenigsberg, Public Trustee* v. *Koenigsberg*.[1])

In *Inland Revenue Commissioners* v. *Sneath*,[2] Lord Hanworth M.R. said[3]: "There must be a lis inter partes in which the "point relied upon for establishing the estoppel was not merely "incidentally, or collaterally, discussed and litigated, but was "fundamental to the conclusion reached by the court. The court "must be one of competent jurisdiction that has seisin of the "case for the purpose of reaching a final decision inter partes, "though it may be a private tribunal such as an arbitrator, "whose forum is a domestic one constituted by the parties them-"selves." Lord Hanworth referred to the judgment of Lord Selborne L.C. in *Reg.* v. *Hutchings*,[4] who said: "The principles "of the law of estoppel by a judgment, inter partes, to which "alone I think it necessary to refer, may be taken from De Grey "C.J.'s opinion in the *Duchess of Kingston's* case,[5] and from that "of Knight Bruce V.-C. in *Barrs* v. *Jackson*.[6] The decision in "the latter case was reversed, but on a ground not at all touching "the statement of principles contained in it. 'The judgment' "(said De Grey C.J.) 'of a court of concurrent' (or of exclusive) "'jurisdiction, *directly upon the point*, is conclusive upon the "'same matter between the same parties coming incidentally in "'question in another court for a different purpose. But neither "'the judgment of a concurrent or exclusive jurisdiction is "'evidence' (that is, as I understand the meaning of the Chief "Justice, conclusive evidence) 'of any matter which came

[1] [1949] 1 Ch. 348; [1949] 1 All E.R. 804.
[2] [1932] 2 K.B. 362.
[3] Ibid. 380.
[4] (1881) 6 Q.B.D. 300, 304.
[5] (1776) 2 Sm.L.C. (7th ed.) 761.
[6] (1842) 2 Sm.L.C. (7th ed.) 807.

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" ' collaterally in question, though within their jurisdiction; *nor* " ' *of any matter incidentally cognisable*, nor of any matter to be " ' inferred by argument from the judgment.' Knight Bruce " V.-C. said: ' It is, I think, to be collected that the rule, against " ' re-agitating matter adjudicated, is subject generally to this " ' restriction—that however essential the establishment of par- " ' ticular facts may be to the soundness of judicial decision, how- " ' ever it may proceed on them as established, and however " ' binding and conclusive the decision may be as to its " ' immediate and direct object, those facts are not all necessarily " ' established conclusively between the parties, and that either " ' may again litigate them for any other purpose as to which they " ' may come in question; provided *the immediate subject of the* " ' *decision* be not attempted to be withdrawn from its operation, " ' *so as to defeat its direct object.*' "

On behalf of the society it was not contended that a decision of a local valuation court or of the Lands Tribunal on a question as to the value of a hereditament could be regarded as binding for the future. But it was submitted that in the present case there had been a decision on a question of status, and that the local valuation court had in 1951 decided that the society had a status which gave it exemption from rates, and that that decision was binding for the future unless in the future the facts were not comparable with those previously existing. I cannot accept this submission. The local valuation court in 1951 did not and could not decide any other question than that which was before it. That question was whether an entry should be made in the valuation list in the manner set out in the proposal of the society. The local valuation court never purported to give a decision which could operate in relation to the year 1956. But it is urged that the decision given in 1951 must have involved the conclusion, as a matter of law, that the society was " instituted for purposes of " science, literature or the fine arts exclusively." Though there is no judgment of the local valuation court in 1951 which can be read so as to see how this aspect of the matter was dealt with, it is true to say that the court in 1951 ought not to have decided as they did unless they did conclude that the society was instituted for purposes of science, literature or the fine arts exclusively. But, in my judgment, no estoppel can arise even in a limited form for the reason that in 1951 the local valuation court had no jurisdiction save to deal with the then existing valuation list. Their decision on any incidental issue of fact or law, even though necessary in order to decide as to the valuation list which was before them, could not, in my judgment, be conclusive in reference to any future entries to be made on any future valuation list. A new list came into existence because there was a statutory obligation to make it. The force and effect of any decision relating to the list that existed in 1951 became spent and exhausted when that list was replaced by the new valuation list.

Both parties agree that it is a general principle that where a question has been decided by a court of competent jurisdiction in a lis inter partes, those parties are estopped from reopening this decision in any subsequent litigation between the same parties as to the same question. In their careful addresses to the court counsel cited numerous authorities. I do not propose to refer to all of these for the reason that many of them merely showed the application of the principle to different sets of circumstances and different topics.

We were referred to various decisions in tax cases including *Patuck* v. *Lloyd*,[7] where Lord Greene M.R. said [8]: "There is no "such thing as res judicata in respect of the decisions of income "tax commissioners. They may or may not follow their previous "decision; but they are not bound to because the subject-matter "is a different year's tax and a different year's assessment and is "not the same as the subject-matter of the previous ruling."

It was submitted on behalf of the valuation officer that a proceeding before a local valuation court is not a lis inter partes, but is more in the nature of necessary administrative machinery for determining what entries should be made in a valuation list. But, in agreement with the view of the Lands Tribunal, I am not prepared to accept this submission. The provisions of section 48 of the Local Government Act, 1948, to which I have referred, show that a local valuation court is not an assessing authority. The court, after hearing such parties as are entitled to appear and be heard and after hearing evidence must give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as are necessary in order to give effect to such contentions of an appellant as they decide to be well founded. But though the proceedings in 1957 can be regarded as being subsequent litigation between parties who previously litigated in 1951, the question in issue in 1957 was not, in my judgment, and for the reasons which I have given, the same question as that which was in issue in 1951.

In *The Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor* [9] an action was brought in 1861 by the Inspector of the Poor and three owners or occupiers of property in North Leith against the Leith Harbour and Docks Commissioners to have it declared that they were liable to be assessed for the relief of the poor in respect of the lands, harbours, docks and property held by them, and that in estimating the yearly value all harbour dues and miscellaneous dues collected by them should be included and taken into account. One defence of the commissioners was that of res judicata; they said that the very question raised in the case had been already decided in a previous suit between the same parties. Further they said that the property sought to be charged was held by them solely for the benefit of the public, and that the revenues were appropriated to

[7] (1944) 26 T.C. 284.
[8] Ibid. 292.
[9] (1866) L.R. 1 Sc. & Div. 17.

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the maintenance of the harbour and the payment of the cost of construction of works. It appeared that some years previously a question had been raised as to the liability of the commissioners to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. The commissioners in then denying liability had then pleaded the same ground of immunity as they later pleaded in the 1861 case as above referred to. The matter was litigated up to the House of Lords, and the House of Lords in 1855 reversed a decision of the Court of Session adverse to the commissioners. But when the decision of the House of Lords of 1855 was examined in considering the later case in 1866 it was manifest that the decision in the earlier case had turned on a totally different point from that of the immunity as claimed by the commissioners. In the later case, which also went to the House of Lords, the plea of res judicata was on this ground held to be invalid by Lord Cranworth L.C. Lord Chelmsford, with whom Lord Kingsdown agreed, while holding that the decision of the House of Lords in 1855 had left open the question of immunity from assessment, gave an additional reason for the failure of the plea of res judicata. He said [10]: "It appears to "me that the argument for the appellants has not sufficiently "attended to the nature of a plea of res judicata. The maxim "of the civil law, 'res judicata pro veritate accipitur,' applied "only when the identical question, which had been once judicially "decided, was again raised between the same parties—the rule "laid down in the Digest, lib. xliv. t. 2, s. 3, being 'exceptionem "'rei judicatae obstare, quoties eadem questio inter easdem "'personas revocatur.' This plea, therefore, is exactly analogous "to a plea in the English courts of 'judgment recovered'; in "which it is necessary, in order to make the judgment operate as "an estoppel, that it should be between the same parties and "upon the same subject-matter coming directly in question, "either in the same court, or in another court of co-ordinate "jurisdiction. Without considering whether the pursuers are "different or substantially the same in the present and in the "former action, or whether the circumstances under which the "question is now raised have been changed from what they were "before by the Act of the 23 & 24 Vict. c. 48, it is sufficient to "say that the proceeding in the present case being for a different "rate from that upon which the former judgment proceeded, the "cause of action is different, and the plea of res judicata is con-"sequently inapplicable."

In my judgment, the reasoning that a proceeding for one rate involves a different cause of action from that in a proceeding for a different rate applies to the situations where different valuation lists are in question.

A corresponding view was taken by the Privy Council in *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken*

[10] L.R. 1 Sc. & Div. 17, 22–23.

Hill.[11] A New South Wales statute laid down a formula for ascertaining the unimproved capital value of a mine for rating purposes. In reference to the assessment of a mine in one year a question arose as to the correct construction of the statute. That question was decided by the High Court of Australia on appeal from the Supreme Court of New South Wales to which court there had been an appeal from a judge of the District Court. In reference to the assessment of the mine for a later year, the Supreme Court of New South Wales considered that they were bound by the previous decision of the High Court of Australia as to the construction of the statute. On appeal to the Privy Council it was held that the question as to the correct method of ascertaining the unimproved value was not res judicata, and in the decision of the Board the matter was thus expressed[12]: "It "was also contended before this Board on behalf of the respon- "dents that having regard to the said decision of the High Court "of Australia the question raised by this appeal is res judicata "as between the appellants and the respondents, and the appel- "lants are estopped from contending that such decision of the "High Court of Australia is wrong. It has been pointed out that "no such question was raised or pleaded either before the District "Court or the Supreme Court in New South Wales, nor has there "been any adjudication or finding upon it. There is, however, "no substance in this contention. The decision of the High "Court related to a valuation and a liability to a tax in a previous "year, and no doubt as regards that year the decision could not "be disputed. The present case relates to a new question— "namely, the valuation for a different year and the liability for "that year. It is not eadem questio, and therefore the principle "of res judicata cannot apply."

These authorities lend support to the view which I have expressed, and, for the reasons I have given, I consider that the Lands Tribunal were correct in rejecting the plea of res judicata.

Sellers L.J. On October 24, 1951, the local valuation court for the area, on the appropriate proceedings having been taken, held that the appellants, the Society of Medical Officers of Health, fulfilled all the necessary requirements of the Scientific Societies Act, 1843, and were exempt from liability to rates in respect of premises occupied by them as offices, being the third-floor rooms, 483–486, Tavistock House, Tavistock Square, W.C.1.

The application for exemption had been contested by the valuation officer (the present respondent) but the decision in favour of the society was not appealed from and the premises became and remained unrated.

Under section 34 of the Local Government Act, 1948, as amended by the New Valuation Lists (Postponement) Act, 1952, and Orders made thereunder, a new valuation list was made to

[11] [1926] A.C. 94.
[12] Ibid. 100.

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come into force on April 1, 1956. The society's premises were entered in the new list with a gross value of £300 and rateable value of £247.

By the appropriate procedure the society again claimed exemption on the same ground as in 1951, namely, that they were exempted from being assessed or rated, or being liable to be assessed or rated, or being liable to pay any rates, by reason of the Scientific Societies Act, 1843. Notwithstanding the adjudication in October, 1951, the valuation officer objected to such exemption, and the matter came before the same court as before, the local valuation court for North-East London, on June 13, 1957.

The society relied on the decision of 1951 that it was a scientific society entitled to exemption under the Act of 1843, and the court, no doubt itself cognisant of its previous decision, held that the issue had already been decided by them, and unless there was some variation in the society's constitution or activities since 1951, the court was not prepared to hear the valuation officer's objection.

Some question was raised before us as to the form rather than the substance, I think, of what happened at the local valuation court. The position was that the society were clearly relying on the decision which had been reached, after a contest between the parties, in 1951, and were saying that whether the society were a scientific society or not was res judicata or more accurately created an estoppel per rem judicatam. It was open to the valuation officer to say that that decision was not binding between the parties because in the intervening years the facts had changed and were so different that whether or not the society came under the Act of 1843 had to be judged afresh in the light of the different circumstances.

The local valuation court adjourned the hearing to enable the valuation officer to challenge the reliance on the decision of 1951 and to contend that the decision no longer applied to the altered circumstances; but he indicated his attitude in the letter of June 14, 1957, cited in full by the Lands Tribunal, and as a consequence on June 24, 1957, the local valuation court made an order exempting the society's premises from rating on the ground that the question of exemption of the society on the basis of its memorandum of association and facts existing in 1951 had already been decided between the parties. In the letter it was stated: "The valuation officer does not contend that any alteration has "been made in the constitution of the society since the earlier "decision of the local valuation court, which was given on "October 24, 1957, and he does not suggest that the society now "carries on activities which it did not then carry on." Whatever the next sentence in the letter may have intended to convey or achieve, it states in part that, even if the then activities of the society were the same as in 1951, it was entirely irrelevant. If the valuation officer had wished he could no doubt have required the society to prove that the circumstances were the same—it

seems a little pedantic to require, as was submitted, that they should be described as similar when one is dealing with a society's constitution and activities and the user of premises—before it could be said and held that the matter in issue was res judicata. That was not the course taken by the valuation officer. He was prepared to accept that the circumstances had not changed, that change or no change was irrelevant, and to argue that in rating matters in respect of entries in a new valuation list, or at least in respect of the entry of these premises, no issue decided on a previous occasion could be binding.

The valuation officer's position in this litigation is emphasised by the course which the dispute subsequently took. The parties agreed to the trial of a preliminary point of law by the Lands Tribunal on the ground that the valuation officer could not be heard to say that the society was not entitled in respect of the premises in question to exemption from rating under the provisions of section 1 of the Scientific Societies Act, 1843, because the local valuation court had in 1951 decided and directed that the society should be exempt thereunder.

This appeal, in my view, must be heard, and can only be heard, as a preliminary point on the basis that the facts and circumstances do not differ from those existing in 1951 in so far as the issue of the society's right to exemption from rateability under the Act of 1843 is concerned.

The question for our consideration is not whether the valuation officer or the local valuation court, if invoked, can consider afresh whether the society's premises should be included in the new valuation list as premises to be rated—of course they must—but whether or not in considering that question there can be litigated again the society's right to exemption under the Act of 1843 if all the relevant circumstances of its constitution and its user of the premises are unchanged. There is, as I see it, no question of the local valuation court having jurisdiction, or even purporting to exercise jurisdiction, to decide in 1951 what should or should not be included in a 1956 or any other valuation list except the then current list. It clearly could do no such thing. Entries in a new valuation list, and in this case the entries in the 1956 valuation list, have to be considered, if challenged, by the procedure provided. The submission of the society is that in their case an estoppel per rem judicatam arises because their claim for exemption can in no way be differentiated from the claim which they have already established.

The basis of an estoppel per rem judicatam is that it is in the public interest that there should be an end to litigation, and I do not favour the submission that a good general ruling to this effect should be held inapplicable because the decision relied on could in effect be reopened by someone who was not a party to the original proceedings. It is for the society in this case, desirous as it is of setting up res judicata as a bar to the claim against it that its premises are rateable, to bring itself within

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all the requirements to establish the plea, except in so far as they are admitted by the valuation officer. It has been accepted that the parties are the same in the litigation now raised as in the decision of 1951. There seem to be five other elements to be established: (1) that there was a judicial decision; (2) that the judicial decision was in fact pronounced; (3) that the tribunal pronouncing the decision had competent jurisdiction to do so; (4) that the decision was final; and (5) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised. I have adopted this convenient summary from Spencer Bower's book on Res Judicata [1924 ed., p. 9].

The decision of the Lands Tribunal deals with the contention on behalf of the valuation officer before him, and those contentions were repeated with perhaps varying emphasis before us. The submissions were that there was and is no estoppel by record by reason of the judgment in personam of the local valuation court because the proceedings there did not create a lis inter partes; that the court was not a court of competent jurisdiction; that the proceedings in 1951 were in respect of the then valuation list and could not apply to proceedings in respect of the new and different valuation list which came into force on April 1, 1956; and that the court in 1951 had no jurisdiction to determine any question raised in 1956.

The society made their proposal in 1951 that they should be exempted from rateability under the Act of 1843 in accordance with the procedure for deciding such an issue if the valuation officer challenged the claim. The procedure is laid down in the Local Government Act, 1948, and in particular in sections 40, 41, 44 and 48. Section 44 provides for a local valuation court to be convened "for the purpose of hearing and determining appeals "under the preceding provisions of this Part of this Act against "objections to proposals for the alteration of valuation lists."

Then section 48 (2) and (4) made certain provisions, which I do not read as my Lord has already read them. Section 49 gives a right of appeal, now to the Lands Tribunal, to any person who appeared before a local valuation court on the hearing of an appeal and is aggrieved by the decision of the court.

I agree with the Lands Tribunal that the local valuation court was a competent court, constituted by the Local Government Act, 1948, to deal with matters in dispute such as arose here and that there was a lis inter partes. The only ground on which the society claimed exemption was that it was a scientific society within the terms of the Act of 1843. It was a question which required a careful judicial inquiry. It received it and a decision thereon from the appropriate court whose decision was final, subject to any appeal—which in this case was not made.

The argument to the contrary was based on several authorities dealing with decisions of the income tax commissioners. As the Lands Tribunal pointed out, the local valuation court is not an

assessing authority, and he, in my view, rightly rejected these submissions of the valuation officer. But he has held that the principle of res judicata could not be applied to proceedings in respect of a different valuation list than that in respect of which a decision had been given. Under present legislation the ratepayers are confronted with the prospect of a new valuation list every five years. If the view appealed against is right, it would seem that if it takes the greater part of five years (as well it might) for a ratepayer (or indeed for a valuation officer) to have the benefit of a decision in the House of Lords, then no sooner would this have been achieved than the whole question could be litigated again on the same material, steadily exhausting one quinquennial period after another.

I would reject the view that there can be no finality on any issue in rating unless authority restrains me. Instability and uncertainty seem to be as undesirable in rating as in any other factor affecting future planning and financing of the affairs of a trade, an organisation or an individual.

A new valuation list provides the occasion for reviewing the entries of premises not only as to their values but as to exemptions and categories, such as industrial or freight transport hereditaments. On the face of it, a value fixed in one year has to be regarded in a different setting both actually and relatively five years later, or even one year later, and in fact there would seem little scope for a plea of res judicata in respect thereof. Authorities were quoted, which counsel for the society did not challenge, to the effect that values or estimates could not be relied on by a plea of res judicata. In the days when a person aggrieved had to challenge a rate in order to air his grievance, an objection sustained or rejected one year could not be said to be res judicata in respect of a newly assessed rate for a subsequent year. The rate had to be estimated afresh each year and was clearly attackable as a new estimate.

But the present issue seems to me not to be affected by a question of value or estimate. The society found itself placed on the new valuation list coming into force on April 1, 1956. Its only claim for exemption was that it was a scientific society within the Act of 1843. The only issue which arose was whether the society was or was not so exempt. In an issue already tried between the same parties, in the court provided to hear such a dispute, it had been held that the society was within the Act in its purposes and activities, and in the occupation and user of the premises, and was entitled thereby to exemption from rates. The matter is, therefore, as I see it, res judicata between the parties involved in that dispute unless circumstances have changed. This preliminary point arises on the basis that circumstances have not changed and, in my opinion, the question cannot be litigated further, even if the decision, if reviewed, might be held to be wrong.

Counsel for the valuation officer relied mainly on the following

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three cases: *The Commissioners of the Leith Harbour and Docks* v. *Inspector of the Poor*,[13] *Reg.* v. *Hutchings*,[14] and the Privy Council case of *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*.[15] In the *Leith Harbour* case[16] the relevant part of the headnote is as follows: "Res Judicata:—That "the court has decided against a poor-rate for one year, is no "reason why it should not decide in favour of a poor-rate for "another and a different year, in respect of the same property, "and in a suit between the same individuals. The doctrine of "res judicata does not apply to such a case," and the valuation officer relied in particular on the speech of Lord Chelsmford.[17] But the speech of Lord Cranworth L.C. on the point was as follows[18]: "There remains the single point of res judicata, which, "I think, will appear to your Lordships to be more plausible than "substantial. Some ten or eleven years ago the question was "raised as to the liability of the commissioners of this very "harbour to contribute to the rate for the year from Whit-"Sunday, 1846, to Whit-Sunday, 1847. They denied liability; "and pleaded, amongst other things, that 'The subjects were "'held by them solely and exclusively for the benefit of the "'public; and further, that the rates and revenues leviable being "'by law limited and appropriated to the maintenance and repair "'of the harbour, and the liquidation of the debt incurred in the "'construction of the works, they were not liable for the assess-"'ment.' That case, however, turned, as appears by Mr. "Macqueen's report of it, on a totally different point. And the "affirmance of a part of the decision below, so far as it was "affirmed, had reference not to the general question of rateability, "but solely to the payment to be made for a particular year. "Care, however, was taken by the House to guard itself from "expressing any opinion as to the general question of the rate-"ability of harbours and docks." The earlier case on which reliance had been placed is inserted in the report[19] and it reveals that both Lord Cranworth L.C. and Lord Brougham made it clear that the judgment of the House should be so drawn up as not to prejudice the parties with respect to any rate that might be imposed thereafter. I do not think that that case is helpful and certainly not conclusive in the present dispute, both because the earlier decision could not in its terms be relied on, and on the general ground that the appeal had been against the rate for a given year.

In *Reg.* v. *Hutchings*,[20] this court held that the adjudication of justices that a street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on

[13] L.R. 1 Sc. & Div. 17.
[14] (1881) 6 Q.B.D. 300.
[15] [1926] A.C. 94.
[16] L.R. 1 Sc. & Div. 17.
[17] Ibid. 22–23.
[18] Ibid. 20–22.
[19] Ibid. 21n.
[20] 6 Q.B.D. 300.

the first application did not estop the local court from claiming the expenses they claimed on the second application. That statement from the headnote seems accurately to state the decision of Lord Selborne L.C., who presided and gave the only judgment of the court.

In the present case no question of the court's jurisdiction to try the issue in 1951, or as to whether its judgment was directly on the point or not has arisen, or could arise, and I fail to see that *Hutchings'* case [20] strongly relied on by counsel for the valuation officer, has any application. In the prior court Lush J., on the basis that the decision was within the justices' jurisdiction, had held that the defendant was entitled to the benefit of the estoppel claimed by him. The effect of *Hutchings'* case [20] was dealt with in *Wakefield Corporation* v. *Cooke*,[21] and treated as a case where the justices clearly had no jurisdiction. The *Wakefield* case [21] itself turned on the conclusiveness of a judgment in rem. In *Broken Hill Proprietary Co. Ltd.* v. *Municipal Council of Broken Hill*,[22] a question which had arisen as to the method of ascertaining the average annual value of a mine was held not res judicata by a decision of the High Court of Australia between the parties to the valuation for a previous year. Lord Carson, who delivered the judgment of the Judicial Committee, in dealing with the estoppel point said [23]: "It was also contended before "this Board on behalf of the respondents that having regard to "the said decision of the High Court of Australia the question "raised by this appeal is res judicata as between the appellants "and the respondents, and the appellants are estopped from "contending that such decision of the High Court of Australia is "wrong. It has been pointed out that no such question was "raised or pleaded either before the District Court or the Supreme "Court in New South Wales, nor has there been any adjudication "or finding upon it. There is, however, no substance in this "contention. The decision of the High Court related to a valua-"tion and a liability to a tax in a previous year, and no doubt "as regards that year the decision could not be disputed. The "present case relates to a new question, namely, the valuation "for a different year and the liability for that year. It is not "eadem questio, and therefore the principle of res judicata cannot "apply."

In the same volume of reports, another Australian case, *Hoystead* v. *Commissioner of Taxation*,[24] is reported. There in a judgment delivered by Lord Shaw the Judicial Committee held that the commissioner was estopped since, although in previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. Lord Wright cited those two Privy Council

[20] 6 Q.B.D. 300.
[21] [1904] A.C. 31; 20 T.L.R. 115.
[22] [1926] A.C. 94.
[23] Ibid. 100.
[24] [1926] A.C. 155.

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cases in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[25] and said it was not necessary to decide between the decisions if they conflicted, or to reconcile them if they merely seemed to conflict. I think the facts here are different from and clearer than those in either of the Australian cases cited. The issue in the present case was not only fundamental; it was the only issue in the appeal to the local valuation court in 1951, and was in no way dependent on any admissions.

Hoystead's case[26] was concerned with taxation and not rating, but I would apply its reasoning to the present case, and would regard it as the most relevant of all the authorities cited to us, especially as taxation is a matter of annual assessment and therefore periodic as is rating.

The full court in Australia had held in respect of the financial year 1918–19 that the trustees of the will were entitled to make this deduction of £5,000 from the assessment of liability to taxation as the six beneficiaries were joint owners, within certain subsections of the Land Tax Assessment Act. Lord Shaw continued[27]: "Matters were allowed to rest upon this footing for "another year. And then, in the subsequent year, the whole "matter was reopened by the action of the commissioner of taxa-"tion who, in respect of the same estate and the same parties, "reverted to the position that the taxable value should not be "six sums of £5,000 as decided in the former case, but one "sum of £5,000. To this it was answered, to put the matter "briefly, that the former decision was right upon its merits, but "that whether so or not, the respondent was estopped by the "judgment already pronounced. If this argument be sound there "is an end of the case; and it will be unnecessary to enter upon "the merits of the difference between the parties upon the con-"struction of the statute. In the opinion of their Lordships the "contention of the appellants is sound, and the respondent is "estopped by judgment." Then Lord Shaw said[28]: "As to the "amount of deduction to be made under the Act, being either "six sums of £5,000 or one sum of £5,000, the former litigation "settled six; the judgment under appeal settled one. There is "accordingly between the same parties in regard to the same "property a definite prescription of deduction from assessable "values. The Board is of opinion that that prescription was as "conclusively settled in the former litigation as language could "settle it, it having been 'How many deductions of £5,000 the "'respondent should make?' and the judicial answer being 'six.' "Apart from the other arguments and the authorities to be "presently alluded to, the case appears thus to be concluded in "favour of the appellants. Very numerous authorities were "referred to. In the opinion of their Lordships it is settled, first, "that the admission of a fact fundamental to the decision arrived

[25] [1939] A.C. 1, 36–37; [1938] 4 All E.R. 747.

[26] [1926] A.C. 155.

[27] Ibid. 163.

[28] Ibid. 165–166.

"at cannot be withdrawn and a fresh litigation started, with a "view of obtaining another judgment upon a different assump- "tion of fact; secondly, the same principle applies not only to an "erroneous admission of a fundamental fact, but to an erronous "assumption as to the legal quality of that fact. Parties are not "permitted to begin fresh litigations because of new views they "may entertain of the law of the case, or new versions which "they present as to what should be a proper apprehension by "the court of the legal result either of the construction of the "documents or the weight of certain circumstances. If this "were permitted litigation would have no end, except when legal "ingenuity is exhausted. It is a principle of law that this cannot "be permitted, and there is abundant authority reiterating that "principle. Thirdly, the same principle—namely, that of setting "to rest rights of litigants, applies to the case where a point, "fundamental to the decision, taken or assumed by the plaintiff "and traversable by the defendant, has not been traversed. In "that case also a defendant is bound by the judgment, although "it may be true enough that subsequent light or ingenuity might "suggest some traverse which had not been taken. The same "principle of setting parties' rights to rest applies and estoppel "occurs." Then the noble Lord referred to some of the cases of outstanding authority, and went on[29]: "It is seen from this "citation of authority that if in any court of competent jurisdic- "tion a decision is reached, a party is estopped from questioning "it in a new legal proceeding."

Inland Revenue Commissioners v. *Sneath*,[30] to which reference was made in the argument, does not seem to be relevant, except for an interlocutory observation by Greer L.J., who said[31]: "I should feel difficulty if the special commissioners was "a court of competent jurisdiction in saying that there was not "here an estoppel." The decision was that the commissioners' determination was not lis inter partes of a competent court so as to create an estoppel per rem judicatam.

The valuation list giving rise to consideration of the issue was new, and the time for applying the decision was different. It seems to me that such sort of consideration would normally arise when the plea of estoppel per rem judicatam is raised. The question is whether the matter in issue is the same. I would hold it to be precisely the same, namely, whether or not the society is qualified as a scientific institution to exemption from rating under the Act of 1843. That is the res, the only issue on which the society can justify its exemption. If on the same facts the local valuation court were to find contrary to its 1951 decision, there would be two conflicting decisions of the same court in litigation between the same parties on the same subject-matter, the only difference being an interval of a few years.

It is not even suggested that any decision of the courts had

[29] [1926] A.C. 155, 170.
[30] [1932] 2 K.B. 362.
[31] Ibid. 372.

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intervened which, if the question can be reviewed, would or might invalidate the first decision. But, even if there were such an authority, it would not defeat the plea of estoppel. In *In re Waring, Westminster Bank* v. *Burton-Butler*,[32] Jenkins J. held that "the decision" (that is, the decision relied on as res judicata) "was a decision . . . that those annuities must be provided "for as annuities of twenty twenty-ninths of the full amount "thereof so long as tax continued at 10s. in the pound. It has "been overruled, or in other words has been held by a higher "tribunal to be wrong in law and not to be followed in other cases, "but it is nevertheless a subsisting order which is binding on the "parties to the proceedings in which it was made."

With deference to my Lords and to Mr. Erskine Simes Q.C., whose view they approve, I do not think that the distinction which they find between *Hoystead's* case[33] and the present holds. The question in the *Hoystead* case[33] was the assessment for tax in a given year. The tax commissioners were held estopped from adopting a different method for that year in a certain matter of allowance in arriving at their assessment than that which had been decided between the parties in the course of litigation two years earlier. In the present case the rating authorities have to prepare a list of those premises which are liable to rating for the given period. In so doing they are estopped from saying that the society is not a scientific society within the meaning of the Act of 1843 and entitled to the benefits which the Act gives them because that precise issue has been decided. The society claims no greater or other estoppel.

I would allow the appeal and would hold, in answer to the question asked, that the Lands Tribunal did not come to a correct decision in law in rejecting the contention of the society set out in paragraph 3 of the case.

Wynn-Parry J. I am of opinion that, for the purposes of considering whether the doctrine of res judicata applies in this case, first, the local valuation court is a court of competent jurisdiction, and, secondly, that the contention between the parties as to whether or not the society is entitled to exemption from liability to be rated in respect of the hereditament in question under section 1 of the Scientific Societies Act, 1843, is a lis inter partes, as regards the society and the valuation officer.

Mr. Tolstoy contended that the decision of the local valuation court in 1951 on the construction of the memorandum of association of the society is, as he put it, a constant factor, and that, therefore, by reason of this decision of the local valuation court in 1951, the society, so far as concerns the construction of its memorandum of association must, when the new valuation list came to be considered in 1956, be held to be still within section 1 of the Scientific Societies Act, 1843.

[32] [1948] 1 Ch. 221, 227; 64 T.L.R. 147; [1948] 1 All E.R. 257.

[33] [1926] A.C. 155.

I agree with Morris L.J. that this is not a sound contention, but, even if it were, it could not conclude the matter: there are other conditions set out in section 1 which must be fulfilled before the benefit of the section can be claimed. It must be shown (inter alia) that the premises are occupied by the society for the transaction of its business and for carrying into effect its purposes. The society may fulfil that condition at one given point of time but fail to do so at another. The question whether or not it does so at any given point of time is wholly a question of fact.

The effect of section 34 of the Local Government Act, 1948, as amended, is that a new valuation list must be prepared every five years by the valuation officer. It is clearly an essential part of his duty to consider the position as regards all premises within his area as they exist at the time of making his list. In 1951, having considered the circumstances as they then existed, he entered the society in the 1951 valuation list on the basis that they were liable to be rated. The local valuation court took the view that in the existing circumstances the society fulfilled all the conditions set out in section 1 of the Scientific Societies Act, 1843, and was, therefore, exempt, and the valuation list was accordingly amended. In 1956 a new list had to be prepared, and for that purpose the circumstances then obtaining had to be ascertained, because, as I have pointed out, the society might have ceased to fulfil one or more of the conditions set out in section 1.

It matters not to my mind what is the result of the investigation into the circumstances obtaining in 1956: it may be found that the society fulfils all the conditions in section 1, or it may be found that the society has ceased to fulfil one or more of the conditions in that section. The vital point is that the investigation has to be made. To my mind the inevitable result of the necessity to make the investigation is that the res which was brought into existence in 1951 becomes exhausted. If, as a result of the valuation officer inserting the society in the new list as liable to be rated, the society make a proposal for exemption, a new issue arises between the parties which has to be resolved. It matters not whether it is resolved by the local valuation court after evidence has been adduced by the valuation officer or whether it is resolved without any evidence being adduced by him. The important and, to my mind, the decisive point is that the new issue has to be resolved.

Now, if this reasoning be right, it must follow that a decision of any court on a particular list can only bind the parties at most during the currency of that list. The local valuation court proceeded on the basis that there was not shown to be any change of circumstances between 1951 and 1956. They therefore decided that the hereditament should be marked "exempt." In doing so, they must be taken not to have applied the doctrine of res judicata, but merely to have followed their own previous decision.

As regards the authorities, the only one which at first sight

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appears to support the society is *Hoystead* v. *Commissioner of Taxation*,[34] a decision of the Judicial Committee of the Privy Council. In my view that case is to be distinguished from the present case; and in order to point the difference, I do not think that I can do better than quote from the decision of Mr. Erskine Simes in the Lands Tribunal: "The distinction between that "case and the one now under consideration seems to me to lie "in the fact that the statute then in question was one which "prescribed the method in which an assessment was to be made "and it was the method which was called in question again in the "subsequent case, whereas in the present case the question is "whether the respondent society should be entered in the list "which came into force in 1956 with gross and rateable values "or as exempt and no decision as to how it should be so entered "in the list has ever been decided." I also agree with what follows: "The point at issue in the present case is not dissimilar "to that raised in *Commissioners of the Leith Harbour and Dock* "v. *Inspector of the Poor*,[35] and the dictum of Lord Chelmsford: "'it is sufficient to say that the proceedings in the present case "'being for a different rate from that upon which the former "'judgment proceeded, the cause of action is different and the "'plea of res judicata is consequently inapplicable' seems to me "to apply to a case where there is a different valuation list."

I therefore conclude that the doctrine of res judicata is inapplicable in this case, and that the decision of the Lands Tribunal was correct.

Appeal dismissed.
Matter to be remitted to the Lands Tribunal.
Leave to appeal to the House of Lords granted.

Solicitors: *Hillearys; Solicitor, Inland Revenue.*

M. M. H.

[34] [1926] A.C. 155.

[35] (1866) L.R. 1 Sc. & Div. 17, 23.

[QUEEN'S BENCH DIVISION.]

LOUIS DREYFUS & CIE. *v.* PARNASO CIA. NAVIERA S.A.

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Feb. 12, 13.

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[1958 L. No. 1988.]

Shipping—Charterparty—Cargo—Declaration of quantity—"Quantity "in owners' option to be declared by the master"—Declaration by master of approximate quantity—Incapacity of vessel to load amount declared—Whether declaration by master binding on owners—Owners responsible for "loss of or damage to or for delay in delivery "of goods"—Owners responsible for "no loss or damage or delay "arising from any other cause whatsoever"—Whether owners responsible for loss arising from failure of vessel to load contract quantity of goods.

Contract — Construction — Deletions — Standard form — Relevance in construing form of deleted words.

Contract—Construction—Ut res magis valeat quam pereat—Promise to give notice of capacity of ship—Notice giving approximate capacity —Whether binding subject to de minimis rule.

Ejusdem generis rule—Contract—Consecutive clauses—Similar subject-matter—Noscitur a sociis—Exceptions clauses in charterparty.

Election or Option—Effect of exercise—Charterparty—Notice of capacity of ship.

Commercial Court—Value of—Speed—Judgment four months after issue of writ.

Words and Phrases—"Loss or damage"—Gencon charterparty.

Ships' Names—Dominator.

A charterparty in the "Gencon" form, dated November 4, 1957, for a single voyage, provided by clause 1 that the *S.S. Dominator* was to proceed to a named port "and there load a full and complete "cargo of not more than 10,450 tons and not less than 8,550 tons "wheat in bulk, quantity in owners' option, to be declared by the "master in writing on commencement of loading . . ." Clause 2 of the charterparty, by the first paragraph, provided: "Owners are "to be responsible for loss of or damage to the goods or for delay "in delivery of the goods only in case the loss, damage or delay "has been caused by improper . . . stowage of the goods . . . or by "personal want of due diligence on the part of the owners or their "manager . . ." By the second paragraph of clause 2: "And the "owners are responsible for no loss or damage or delay arising "from any other cause whatsoever . . . " The third paragraph of the clause in the printed form, which had been deleted, related to damage to goods.

On arrival at the port the master of the vessel wrote to the charterers that "the approximative [sic] cargo to the holds will "be . . . Total 10,400 tons." The charterers brought that quantity of cargo to the port, but in fact the master had over-estimated the capacity of the vessel and she loaded 331 long tons short. As a result of the vessel's inability to load the whole of the cargo the charterers incurred expenses which they sought to recover from the shipowners. The shipowners, inter alia, relied on the second paragraph of clause 2 of the charterparty as exempting them from liability:—

Held, (1) that, on the true construction of clause 1 of the charterparty, once the shipowners had exercised their option through their nominated agent, the master, of declaring the quantity of cargo to be carried, the quantity so declared between the limits was

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to be deemed a full and complete cargo for the purposes of the charterparty; that the word "approximative" in the master's notice to the charterers, which purported to be given under the clause and therefore to be of an exact quantity, referred only to those limits of tolerance imported into such commercial contracts by the de minimis rule, so that the notice was a good declaration under the clause; and that, therefore, the quantity of cargo to be loaded under the contract was 10,400 tons.

Dictum of MacKinnon J. in *Chandris* v. *Louis Dreyfus & Co.* (1934) 50 Ll.L.Rep. 141, 145 considered.

(2) That since the words "no loss or damage or delay" in the second paragraph of clause 2 of the charterparty were in their context ambiguous, assistance in their construction might be obtained by looking at the deleted printed words of the third paragraph of the clause.

Where a standard form of words familiar to commercial men was contained in a printed form in general use it was unreal to suppose that, when the contracting parties struck out a provision dealing with a specific matter, but retained other provisions, they intended to effect any alteration other than the exclusion of the provision struck out and, prima facie, no such intention should be ascribed to them.

(3) That on its true construction the operation of the whole of clause 2 was limited to loss of or damage to or delay in the delivery of goods, and the second paragraph, therefore, did not exempt the shipowners from liability for loss sustained by the charterers owing to the shipowners' failure to load the contract quantity of cargo. The charterers, accordingly, were entitled to recover from the shipowners.

Action.

By a printed charterparty in the form known as "Gencon" recommended by the Documentary Council of the Baltic and White Sea Conference, dated November 4, 1957, made between the plaintiffs, Louis Dreyfus & Cie., as charterers, and the defendants, Parnaso Cia. Naviera S.A., as owners of the *S.S. Dominator*, it was provided, by clause 1, that the vessel was to "proceed to La Pallice . . . and there load a full and com-"plete cargo of not more than 10,450 tons and not less than "8,550 tons wheat in bulk, quantity in owners' option, to be "declared by the master in writing on commencement of loading ". . . which the charterers bind themselves to ship, and being "so loaded the vessel shall proceed to Karachi . . . and there "deliver the cargo on being paid freight."

By clause 2 of the charterparty "Owners are to be responsible "for loss of or damage to the goods or for delay in delivery of "the goods only in case the loss, damage or delay has been "caused by the improper or negligent stowage of the goods . . . "or by personal want of due diligence on the part of the owners "or their manager to make the vessel in all respects seaworthy "and to secure that she is properly manned, equipped and sup-"plied or by the personal act or default of the owners or their "manager.

"And the owners are responsible for no loss or damage or "delay arising from any other cause whatsoever, even from the

"neglect or default of the captain or crew or some other person "... for whose acts they would, but for this clause, be responsible, or from unseaworthiness, of the vessel on loading or "commencement of the voyage or at any time whatsoever."

The third paragraph of clause 2 in the printed form provided: "Damage caused by contact with or leakage, smell or evaporation "from other goods or by the inflammable or explosive nature "or insufficient package of other goods not to be considered as "caused by improper or negligent stowage, even if in fact so "caused" but that paragraph had been deleted and the following words inserted in typescript "Owners to be responsible for "number of bags signed for in bills of lading."

Clause 16 provided that the charterers were "to supply a "sufficient quantity of cargo in bags for safe stowage as required "by the master, not exceeding 7½ per cent. of the entire cargo, "such quantity to be declared by the master in writing on com-"mencement of loading."

The vessel arrived at La Pallice on November 23, 1957, when, on the request of the charterers' agents for an immediate declaration in accordance with the provisions of clause 1 of the charter-party, the master, after making calculations, wrote to the agents in the following terms:

"To the shippers La Pallice.

"I the Master ... of the steamer *Dominator* I have to "notify you that I shall require 300 tons wheat in bags for "loading and the approximative [*sic*] cargo to the holds will be "as follows:—

"No. 1 hold 1,600 long tons.
" 2 hold 3,000 ditto.
" 3 hold 2,000 ditto.
" 4 hold 2,150 ditto.
" 5 hold 1,650 ditto.
"Total:—10,400 tons."

The master had inadvertently calculated the quantity of cargo which the vessel could load on the basis of summer marks instead of winter marks on which the vessel was sailing, so that she was unable to load the total 10,400 tons and in fact loaded 331 long tons short. The charterers had brought the whole of the cargo to La Pallice and as a result of the inability of the vessel to load the 331 long tons incurred expenses which were agreed at £155 8s. 2d.

The charterers withheld that amount from the freight and, alleging that, upon the declaration by the master, the shipowners became obliged to load and/or warranted that the vessel was capable of loading 10,400 tons, claimed a declaration, inter alia, (a) that by reason of the inability of the vessel safely to load the 331 long tons the shipowners were in breach of the charter-party and (b) that the damages suffered by reason of that breach amounted to £155 8s. 2d.

The shipowners denied that they were under any liability to

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the charterers and alleged that had the vessel been able to take 10,400 tons the 331 long tons would have been loaded and that she had in fact sailed from La Pallice with a full and complete cargo; they denied that the notification by the master to the charterers had the effect in law for which the charterers contended or any effect in law. Further or alternatively they relied upon clause 2 of the charterparty as exempting them from any liability to the charterers.

R. A. MacCrindle for the plaintiff charterers.
Michael Kerr for the defendant shipowners.

The following cases were cited in argument: *Chandris* v. *Louis Dreyfus & Co.*[1]; *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[2]; *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[3]; *S.S. Istros* v. *F. W. Dahlstroem & Co.*[4]; *The Roberta*[5]; *Brightman & Co. Ltd.* v. *Bunge y Born Limitada Sociedad*[6]; *Morris* v. *Levison*[7]; *The Resolven*[8]; *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama*[9]; *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.*[10]; *Goulandris Brothers Ltd.* v. *B. Goldman & Sons Ltd.*[11] and *Shipton, Anderson & Co.* v. *Weil Bros. & Co. Ltd.*[12]

Diplock J. This is an action brought by the French charterers of a Panamanian ship for declarations relating to their rights in respect of an alleged breach of the charter by the shipowners. The writ was issued on October 27, 1958. Judgment is being delivered today, less than four months since the action was started. It is a matter for congratulation to the parties that the matter in dispute between them should come for its initial solution, at any rate, so very shortly after the proceedings started; and I may say, as I have said before, that it is to provide expeditious decisions on commercial matters of this kind that the commercial list was set up.

The matter arises in this way: On November 4, 1957, the plaintiffs and defendants entered into a charter in the "Gencon" form. The first clause which I must read—I fortunately need read but few of the clauses of this charter—is the first clause in the charter itself, where it was provided that the Panamanian vessel *Dominator* should proceed to La Pallice afloat "and there

[1] (1934) 50 Ll.L.Rep. 141.
[2] (1897) 2 Com.Cas. 173.
[3] [1910] 1 K.B. 627; 26 T.L.R. 301.
[4] [1931] 1 K.B. 247.
[5] (1938) 60 Ll.L.Rep. 84.
[6] [1924] 2 K.B. 619; 40 T.L.R. 876.
[7] (1876) 1 C.P.D. 155.
[8] (1892) 9 T.L.R. 75.
[9] [1957] A.C. 149; [1957] 2 W.L.R. 46; [1956] 3 All E.R. 957.
[10] [1957] 2 Q.B. 233; [1957] 2 W.L.R. 509, 968; [1957] 1 All E.R. 673; [1957] 2 All E.R. 311; sub nom. *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* [1958] 2 W.L.R. 688; [1958] 1 All E.R. 725, H.L.
[11] [1958] 1 Q.B. 74; [1957] 3 W.L.R. 596; [1957] 3 All E.R. 100.
[12] (1912) 17 Com.Cas. 153.

"load a full and complete cargo of not more than 10,450 tons "and not less than 8,550 tons wheat in bulk, quantity in owners' "option, to be declared by the master in writing on commence- "ment of loading"—I omit an irrelevant clause in parenthesis— "which the charterers bind themselves to ship, and being so "loaded the vessel shall proceed to Karachi." The freight was on a tonnage basis.

The vessel proceeded to La Pallice, and on November 23 the master gave a notice purporting to be a declaration in writing made under clause 1 of the charter. That notice was in this form: "To the Shippers, La Pallice. I . . . the Master of the "steamer 'Dominator,' I have notify you that I shall require 300 "tons wheat in bags for loading and the approximative cargo to "the holds will be as follows: No. 1 hold 1,600 long tons, No. 2 "hold 3,000 long tons, No. 3 hold 2,000 long tons, No. 4 hold 2,150 "long tons, No. 5 hold 1,650 long tons; total 10,400 tons," and was signed by the master, Captain Roussos, who is a Greek by nationality, which may account for the slightly imperfect English in which the notice is cast.

The vessel started loading, but at the time she was sailing to her winter marks and she proved incapable of carrying the full amount of 10,400 tons, and in fact loaded 331 long tons short. The charterers had brought the cargo to La Pallice ready to load pursuant to the master's notice and as a result of the vessel's inability to load the 331 tons, expenses amounting to some £155 were incurred in sending that portion of the cargo elsewhere, which the charterers deducted from the freight. The question which I have to determine is whether they are entitled —whether by way of set-off or whether by way of claim for damages does not matter in the circumstances of this case—to recover from the shipowners for breach of contract the expenses incurred in that way. That question depends upon two points of construction: first, the true construction of the clause which I have already read and secondly, if I am in favour of the charterers on the construction of that clause, there arises the question of the construction of the "Gencon" owners' responsibility clause.

At first sight, it would seem plain that once the owners had exercised their option, through their nominated agent, the master, of declaring the quantity to be carried, the quantity of cargo which they were bound to load and the charterers bound to ship was the quantity so declared. Is there some mystique about charterparties which prevents the words from having this effect, which I think is a perfectly plain one? I doubt if it would have been argued that the words had any other meaning than the one I have suggested were it not for a certain dictum of MacKinnon J. in *Chandris* v. *Louis Dreyfus & Co.*[1] Before I read that it is desirable to note that that was an action for rectification of a

[1] (1934) 50 Ll.L.Rep. 141, 145.

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charterparty in respect of which arbitration proceedings were already current, and the main point in the case was whether a provision in the charterparty containing an undertaking by the owners as to the capacity of the vessel should be rectified. The undertaking in the charterparty as signed was as follows: "That "the said steamer . . . shall proceed to one or two ports be-"tween Karachi and Calicut . . . and . . . load in customary "manner from the charterers . . . a full and complete cargo of "linseed and/or groundnut kernels in bags . . . which owners "undertake will be not more than 2,300 tons and not less than "2,000 tons English weight linseed and/or groundnut kernels in "bags." Since the vessel was capable of carrying a great deal more linseed than groundnut kernels, groundnut kernels being a bulkier cargo, the main issue between the parties was whether or not the warranty as to capacity related to linseed alone or whether it did, as expressed, also warrant a capacity for groundnut kernels. As a result of consideration of the evidence, MacKinnon J. came to the conclusion that the former was the real agreement between the parties and that the contract should be rectified accordingly. The actual form of the rectification he left to the parties. There was, however, a provision in the charterparty: "The master to declare quantity of cargo required on "readiness to load." The master had in fact declared 1,850 tons as the quantity required of groundnut kernels. The capacity of the vessel for groundnut kernels, it would appear from the report, was 1,730 tons. Again it would appear from the report, though not very clearly, that there was some alternative claim being prosecuted before the arbitrator based upon an obligation to carry the amount declared by the master—an amount be it observed, which was greater than the carrying capacity for groundnut kernels which the judge had held that the owners had warranted. In relation to that, application was also made to MacKinnon J. to rectify the charter further by deleting the words "The "master to declare quantity of cargo required on readiness to "load." MacKinnon J., on the evidence, thought that the charter should not be rectified in this way, and he went on to say this [2]: "Mr. Catsell very candidly has said: 'I think this clause, "The "'"master to declare quantity of cargo required on readiness to "'"load" is part of the usual Bombay charter adapted.' That "being so, it must stand as part of this charter. I was going to say "that I express no opinion as to the effect of that. I may perhaps "state that it does not seem to me that it has really any con-"tractual effect at all; it is merely a sort of intimation for the "convenience of the parties; but I cannot think that, if the "master says a certain figure, he would be varying the terms "of the charter or creating a new contractual liability for his "owners. However, that is only my present impression; I have "not had it exhaustively argued, and it is not necessary for "that to happen." I do not think that that dictum, in somewhat

[2] 50 Ll.L.Rep. 141, 145.

obscure circumstances relating to a charterparty in different terms from that with which I have to deal, really assists me in deciding the meaning of the clause in this case.

No doubt, if the clause had read "there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk" and had stopped there, the obligations of the parties would have been that the owners warranted a minimum capacity of 8,550 tons and that the charterers were under an obligation to provide a full and complete cargo up to 10,450 tons if the vessel were capable of holding so much, but under no obligation to provide more. That well-known construction of clauses of this nature is confirmed by the judgments of Mathew J. in *Carlton Steamship Co. Ltd.* v. *Castle Mail Packets Co. Ltd.*[3] and of Hamilton J. in *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*[4]

Those being the obligations if the clause stopped there, there is no question of any option. The parties' rights are defined finally by the words of the clause. But here those words are followed by the phrase "quantity in owners' option, to be declared by the master in writing on commencement of loading." These words seem to me to make all the difference. Whatever quantity the master declares within those limits is to be deemed to be a full and complete cargo for the purposes of the charter. I therefore reject Mr. Kerr's argument, based on the dictum of MacKinnon J.[5] that the words in this charterparty "quantity in owners' option, to be declared by the master in writing on commencement of loading" have no contractual effect at all —a somewhat surprising submission.

The declaration required is of an exact quantity, but exact subject to the de minimis rule which applies particularly to commercial contracts. The declaration by the master contains the word "approximative": "the approximative cargo to the holds will be as follows," and it then sets out tonnage for the individual holds and "total, 10,400 tons." Mr. Kerr submits that the declaration must be construed as if it contained words such as "about" or "thereabouts." He says that that is what "approximative" means, and he relies upon the well-known cases where such words have been used in contracts for the carriage of goods or the sale of goods, and which show that a tolerance greater than the de minimis tolerance is an allowable tolerance. He instanced cases where 3 per cent. or as much as 5 per cent. has been treated as being a compliance with the words "about" or "thereabouts," and points out that here the goods shipped were only 3·14 per cent. less than the quantity declared. It may be, he concedes, that in giving a declaration in this form, containing the word "approximative," the master as agent for the owners committed a breach of contract, but he says that the shippers accepted the notice in this form, that they are not suing for that

[3] (1897) 2 Com.Cas. 173, 177.
[4] [1910] 1 K.B. 627, 629.
[5] 50 Ll.L.Rep. 141, 145.

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particular breach of contract, and that the quantity in fact loaded does comply with the notice when full effect is given to the word "approximative." I do not think that the cases on the construction of contracts assist here. What I have to construe is a document purporting to be given under clause 1 of the charter, which therefore purports to be a declaration of an exact quantity within those narrow limits of tolerance which the de minimis rule incorporates in every contract. I think that it is right for me to construe it as one complying with the terms of the contract, if such a construction is open to me. "Approximative" is a word which has no defined limits of tolerance; and I construe it accordingly as referring to those limits of tolerance which the de minimis rule imports into contracts of this kind. I therefore hold that the notice was a good notice.

I am somewhat sorry to come to that conclusion, despite its according in my view with common justice, because that compels me now to construe the "Gencon" exceptions clause, which, although it apparently came into force as long ago as September 15, 1922, has so far escaped construction by the courts. It is my misfortune, apparently, to have to try to make sense of it. The exceptions clause, clause 2 of the charterparty, consists of three printed paragraphs, the third of which has been deleted and typed words substituted for it. The first question which I have to consider is whether, in order to assist myself in construing the paragraphs that remain, I can look at the one which has been deleted. There is a pleasant diversity of authority on this subject which the curious can find conveniently listed in a note in Scrutton on Charterparties, 16th ed. (1955), p. 33. But the court, in construing a contract, is seeking to ascertain the intention of the parties as expressed in the words that they have used. Where there is a standard form of words familiar to commercial men and contained in a printed form in general use, such as the "Gencon" charter, it seems unreal to suppose that when the contracting parties strike out a provision dealing with a specific matter, but retain other provisions, they intend to effect any alteration other than the exclusion of the provision struck out. I cannot, prima facie at any rate, ascribe to them any intention of altering the meaning of the words in the provisions which they have chosen to retain. I say "prima facie" because there may be added or substituted words which drive one to the conclusion that they did intend to ascribe to the words retained a meaning modified by the added or substituted provisions; but, while I think that I must look first at the clause in its actual form without the deleted words, if I find the clause ambiguous, I think that I am entitled to look at the deleted words to see if any assistance can be derived from them in solving the ambiguity, bearing in mind the prima facie rule which I have indicated.

The clause is in these terms: "Owners are to be responsible "for loss of or damage to the goods or for delay in delivery of the "goods only in case the loss, damage or delay has been caused

"by the improper or negligent stowage (stowage to be under "the master's direction) or by personal want of due diligence "on the part of the owners or their manager to make the vessel in "all respects seaworthy and to secure that she is properly "manned, equipped and supplied or by the personal act or "default of the owners or their manager." Then the second paragraph is: "And the owners are responsible for no loss or "damage or delay arising from any other cause whatsoever, "even from the neglect or default of the captain or crew or some "other person employed by the owners on board or ashore for "whose acts they would, but for this clause, be responsible, or "from unseaworthiness, of the vessel on loading or commence-"ment of the voyage or at any time whatsoever. Owners to be "responsible for number of bags signed for in bills of lading," the last words that I have read being those substituted for the printed clause which I shall read later.

Paragraph 1 of this clause is expressly limited to loss of or damage to the goods or to delay in delivery of the goods, and the phrase "the loss, damage or delay" is also plainly so limited. The paragraph is clumsy in form, because it appears to be placing a positive liability for loss, damage or delay arising from certain causes, a liability which would exist at common law quite apart from the clause. It negatives or excludes liability which would exist at common law for damage, loss or delay from other causes only in so far as such exclusion is implicit in the word "only"—"Owners are to be responsible for loss of or "damage to the goods or for delay in delivery of the goods only" in such and such case. One would not expect the draftsman of a clause designed to exclude liabilities which would otherwise exist at common law to rest content with an exclusion which was merely implicit, and, having started with his first paragraph in the positive form, one would expect him to go on to state in express words the exclusion of liability which up to that stage has only been implicit by the use of the word "only." And this, it seems to me, is what he has done, for he goes on: "And"—a conjunctive word consistent with a reference to the same subject-matter as has gone before—"the owners are responsible for no loss or damage or delay," the same phrase as used above where it was clearly limited to loss of or damage to the goods or delay in delivery of the goods, "arising from any other cause "whatsoever." It is not "no loss or damage or delay whatso-"ever," or any other word used to enlarge its meaning, although the word "whatsoever" is used in relation to cause. The paragraph might well have stopped with the words "any other "cause whatsoever," but per majorem cautelam the draftsman goes on to say "even from the neglect or default of the "captain or crew or some other person employed by the owners "on board or ashore for whose acts they would, but for this "clause, be responsible, or from unseaworthiness of the vessel "on loading or commencement of the voyage or at any time

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"whatsoever," all of which would have been excluded, one would have thought, by the words "any other cause whatsoever." One finds here, therefore, a draftsman (cautious, no doubt, because of the contra proferentem rule) who is taking the opportunity of saying, in all the ways that he can think of, that the owner is not to be responsible for damage of the kind which is the subject-matter of the exceptions clause other than that arising from particular causes.

There is, I think, ambiguity here. The words "no loss or "damage or delay" in the second paragraph are capable of a wide meaning extending the ambit of the clause beyond what is dealt with in the first paragraph, or are capable of the narrower meaning with which the same phrase was used in paragraph 1 of the clause; that is to say, they are capable of being read as relating to the same subject-matter as the first paragraph, namely, loss of or damage to the goods or delay in delivery of the goods; and, when I look at the third paragraph as it appears in this charterparty, "Owners to be responsible for "number of bags signed for in bills of lading," I find that the third paragraph, like the first, is relating to loss of, damage to, goods.

As I say, there is an ambiguity, and I am accordingly going to look at the deleted paragraph to see if it throws any light upon that ambiguity. The deleted paragraph was in these terms: "Damage caused by contact with or leakage, smell or evapora-"tion from other goods or by the inflammable or explosive nature "or insufficient package of other goods not to be considered as "caused by improper or negligent stowage, even if in fact so "caused." That deals plainly, and deals only, with damage to the goods. It is an exception to the first paragraph of the clause. I see, therefore, that in its printed form, and indeed (though perhaps less cogently) in its substituted form, paragraph 2 is sandwiched between two paragraphs plainly dealing only with loss of, damage to, or delay in delivery of the goods. I find also that I am dealing with a clause which is purporting to limit a common law liability.

Fortified by the two Latin tags, contra proferentes and noscitur a sociis, I am prepared to resolve the ambiguity by holding that the clause is limited to liability for loss of or damage to the goods or delay in delivery of the goods and that it does not cover loss sustained by the charterers owing to the failure of the shipowners to load the contract quantity of goods. That contract quantity I have held to be the quantity declared by the master in the notice given under clause 1 of the charterparty. Accordingly, the plaintiffs succeed.

Declarations accordingly.

Solicitors: *Richards, Butler & Co.; Holman, Fenwick & Willan.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

BIRTLEY AND DISTRICT CO-OPERATIVE SOCIETY LTD. v. WINDY NOOK AND DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY LTD. (NO. 2).

1958
Nov. 3, 4, 5, 6, 10;
Dec. 16.

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[1957 B. No. 1416.]

Arbitration—Award—Illegality—Restraint of trade—Award ex facie lawful—Whether court entitled to look behind award.

Restraint of Trade—Arbitration award—Co-operative trading societies—Restriction on trading activities of one society—Whether unreasonable restraint of trade.

Trade Union—Meaning—Co-operative trading—Union consisting of co-operative societies—Whether union a trade union—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 4.

The plaintiffs and the defendants were both co-operative trading societies and members of the Co-operative Union Ltd. A dispute having arisen as to their respective trading areas, the matter was referred to arbitration under rule 10 of the union's rules and an award was made in favour of the plaintiffs, providing that co-operative services should be provided exclusively by them in a specified area. Before the final award was made the defendants terminated their membership of the union and refused to accept or be bound by the award. The plaintiffs then brought an action claiming a declaration that the award was binding on the defendants.

The defendants alleged, inter alia, (1) that if rule 10 constituted a valid submission entitling the arbitrators to make an award affecting the defendants' conduct after ceasing membership, the contract between the parties contained in the rules of the union, in particular rule 10, was an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposed on the defendants restrictions after they had ceased membership of the union; and (2) that the union was a trade union within the meaning of the Trade Union Acts, 1871–1913, and therefore section 4 of the Act of 1871 [1] barred the action. A trade union was defined in section 16 of the Act of 1876 as "any combination . . . for regulating the relations "between . . . masters and masters, or for imposing restrictive "conditions on the conduct of any trade or business, whether such "combination would or would not, if the principal Act had not "been passed, have been deemed to have been an unlawful combina-"tion by reason of some one or more of its purposes being in "restraint of trade":—

Held, (1) that rule 10 merely provided the machinery for settling disputes and did not, of itself, restrain anyone—it was not until the award was made that anyone could be restrained; that there was nothing on the face of the award to indicate that it was an unreasonable restraint of trade; and that the court was not entitled to look behind the award and become, in effect, an appellate tribunal from the arbitrators. Further, the defendants were not being restricted

[1] Trade Union Act, 1871, s. 4: "Nothing in this Act shall enable "any court to entertain any legal "proceeding instituted with the object "of directly enforcing or recovering "damages for the breach of any of "the following agreements, namely, "(1) Any agreement between mem-"bers of a trade union as such, "concerning the conditions on which "any members for the time being of "such trade union shall or shall not "sell their goods, transact business, "employ, or be employed."

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from carrying on business as they had done prior to 1956, and it was not unreasonable in the interests of economical co-operative trading and of the public to prevent their extension to an adjacent area.

(2) That the Co-operative Union Ltd. was not a trade union because (a) the fact that it consisted of member societies who could only carry on their business by employees did not make it a combination of masters, nor, under section 4, an agreement between members of a trade union as such; it was simply a combination of traders; (b) the union did not "impose" anything, for although its objects were to carry on specified activities with a view to propagating co-operative principles, no society which did not already have as one of its objects the promotion of co-operative principles could become a member; and (c) even if rule 10 imposed restrictive conditions, it was not a "principal object" of the union as required by section 2 (1) of the Act of 1913.

Action.

The plaintiffs, Birtley and District Co-operative Society Ltd., and the defendants, Windy Nook and District Industrial Co-operative Society Ltd., were both co-operative trading societies, trading in the Washington Urban District in County Durham, registered under the Industrial and Provident Societies Act, 1893, and members of the Co-operative Union Ltd., which was also registered under the Act of 1893. The rules of the union provide by rule 10: "No society shall be admitted into the union "unless the management is of a representative character. No "society shall be allowed to remain in membership with the "union which does not abide by its rules, conform to its aims, "and accept the decisions of the central executive confirmed by "congress. Any disagreement that may arise as to overlapping "or any other matter which cannot be settled in consultation "between the parties shall, in failure of conciliation, be submitted "to persons appointed by the Co-operative Union Ltd. as "arbitrators and their decision shall be final and binding on all "parties." The Washington Urban District was divided into five wards (Washington Ward, Washington Station Ward, Usworth Colliery Ward, Great Usworth Ward and Springwell Ward), and prior to 1956 the plaintiffs had a general branch on the boundary of Washington Ward and Usworth Colliery Ward, a grocery, hardware and drapery branch in Washington Station Ward, and a grocery branch in Usworth Colliery Ward; the defendants had a general branch and a greengrocery branch in Springwell Ward. Before 1956 the plaintiffs had the predominance of co-operative trade in Washington Station Ward, Washington Ward and Usworth Colliery Ward, whereas the defendants had the predominance of co-operative trade in Springwell Ward, but neither society had established a store in Great Usworth Ward, although each had customers living there who either went to the nearest shop of whichever society they preferred or would be served by vans.

As early as 1951–1952 this overlapping gave rise to disputes between the two societies. Eventually a new building estate was

developed in Great Usworth Ward, and in 1955 the Washington Urban District Council allotted one shop to each society. Each of them opened such shops in 1956 within a short distance of one another. The plaintiffs having been first in the field in the Washington area (having opened their first store in 1873), and having predominance everywhere except Springwell Ward (with Great Usworth doubtful), claimed that with the exception of Springwell Ward they had an exclusive right to afford co-operative service in the area. As a result of those matters, and since negotiation and conciliation had failed, the plaintiffs referred the matter to the head office of the union for arbitration under rule 10. The defendants boycotted the arbitration and in their absence an award was made in favour of the plaintiffs on November 5, 1955, which provided that (1) co-operative service in the Washington area should be provided exclusively by the plaintiffs, and that the defendants should not canvass for customers nor trade in that area from fixed premises therein or mobile shops or vans; (2) for the purposes of the award the Washington area should be regarded as the territory administered by the Washington Urban District Council; and (3) the plaintiffs and defendants should negotiate with the urban district council for the tenancy of the shops in the Great Usworth Ward allocated to the defendants to be transferred to the plaintiffs, or the defendants should determine their tenancy forthwith. The defendants refused to accept or be bound by the award.

On February 3, 1956, the plaintiffs' solicitors wrote to the defendants saying that unless within one week they affirmed their readiness to abide by the award and comply with its terms, the plaintiffs would take action to enforce it. The plaintiffs' advisers then noticed that the award was wider in its terms than the circumstances justified, because the plaintiffs had never contended that the defendants should be precluded from co-operative trading in the Springwell Ward of the Washington Urban District Council where they had been established since 1891, and paragraph 2 of the award was therefore wider than the plaintiffs asked for and wider than the arbitrators intended. It was also realised that, in any event, paragraph 3 was untenable. To avoid any possible complications in the proposed action to enforce the award, the plaintiffs, on February 29, 1956, took out a summons for time to apply to the High Court to remit the award to the arbitrators to correct the mistakes. On March 16, the defendants also took out a summons for time to apply to the High Court to set aside the award in toto. Both summonses were headed "In the matter of the Arbitration Act, 1950." On March 20, 1956, the defendants resolved to terminate their membership of the Co-operative Union Ltd., and on March 21 notified the union accordingly. On the same day, the defendants, like the plaintiffs, appeared by counsel at the hearing of their summonses. Each party was granted time. Notices of motion having been

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given, on July 23 the two motions came before Pearson J., when on the plaintiffs' motion the judge remitted paragraphs 1 and 2 of the award and set aside paragraph 3, and dismissed the defendants' motion with costs. As a result the arbitrators met to reconsider their award in accordance with Pearson J.'s order. The defendants refused to attend, claiming that as they had ceased to be members of the Co-operative Union Ltd., no award could be effective against them. On September 18, 1956, the arbitrators made their amended award.

The plaintiffs, by writ issued on May 8, 1957, claimed a declaration that the arbitrators' award of September 18, 1956, was binding on the defendants, and that they were thereby precluded from providing co-operative services contrary to the terms thereof. They further claimed an injunction restraining the defendants from providing or attempting to provide co-operative service, and from canvassing or attempting to canvass for members or trade contrary to the terms of the award. The plaintiffs also claimed damages and interest.

By their reamended defence the defendants pleaded (1) that rule 10 of the Co-operative Union Ltd. was too vague and uncertain to constitute a valid submission; (2) that the terms of reference to the arbitrators were wider than any submission contained in rule 10; (3) that by certain letters, and the defendants' withdrawal from membership of the union after the reference but before the final award, they revoked the submission to, and any jurisdiction of, the arbitrators; (4) that on its true construction, rule 10 did not constitute a submission to arbitration in respect of, nor entitle the arbitrators to make an award affecting, the conduct of a society after it had ceased to be a member of the Co-operative Union Ltd., and that there must be an implied term in rule 10 to that effect; (5) that if rule 10 constituted a valid submission entitling the arbitrators to make an award affecting the defendants' conduct after ceasing membership, the contract between the parties contained in the rules, in particular in rule 10, was an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposed on the defendants restrictions after they had ceased membership of the union; (6) that the action being in effect for specific performance of the award of September 18, 1956, the plaintiffs had been guilty of laches, in that, being aware that the defendants were at all material times continuing to trade contrary to its terms necessitating the expenditure of capital money, the plaintiffs took no action until the issue of the writ; (7) that the Co-operative Union Ltd. was a trade union within the meaning of the Trade Union Acts, 1871–1913, and the defendants relied on section 4 of the Act of 1871 [1] as a bar to the action.

At the hearing of the action, the defendants sought leave to counterclaim for an order setting aside the award on the ground

[1] For footnote 1 see p. 415.

of the alleged bias and misconduct of the arbitrators. Streatfeild J. refused leave: see *Birtley and District Co-operative Society Ltd.* v. *Windy Nook and District Industrial Co-operative Society Ltd.*[2]

The following report concerns only the points raised by the fifth and seventh defences. The second and sixth defences were not pressed at the trial. As far as the first defence was concerned, Streatfeild J. was unable to accept the defendants' argument. As to the third defence, his Lordship held that rule 10 constituted a valid and binding written submission to arbitration between two member societies (as they were at the date of the submission), and that it amounted to a written "arbitration agreement" under section 32 of the Arbitration Act, 1950, and that, therefore, the authority of the arbitrators was irrevocable in law, and that neither letters written by the defendants purporting to revoke the authority of the arbitrators, nor their withdrawal from the union, constituted any effective revocation of the authority of the arbitrators. As to the fourth defence, his Lordship held that the submission having been made while the defendants were still members and still bound by the rules, rule 10 did entitle the arbitrators to make an award binding on them after they ceased to be members of the union, and it made no difference that they ceased to be members before the final award.

Sir Frank Soskice Q.C. and *R. A. MacCrindle* for the plaintiffs.
Gerald Gardiner Q.C. and *Alan S. Orr* for the defendants.

The following cases were cited during argument on the points dealt with in this report, in addition to those referred to in the judgment: *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*[3]; *Gozney* v. *Bristol Trade and Provident Society*[4]; *North-Western Salt Co. Ltd.* v. *Electrolytic Alkali Co. Ltd.*[5]; *Clarke* v. *Dunraven*[6]; *Osborne* v. *Amalgamated Society of Railway Servants*[7]; *Aubert* v. *Naze*[8]; *In re Boks & Co. and Peters, Rushton & Co.*[9]; *Taylor (David) & Son* v. *Barnett Trading Co.*[10]

Cur. adv. vult.

December 16. STREATFEILD J. stated the facts, of which those relevant to the present report are set out above, and continued: Sir Frank Soskice's principal submission on behalf of the plaintiffs may be summarised as follows: Where parties to a dispute have by a valid contract bound themselves to refer the matter to arbitration, and the arbitrators, appointed in accordance with the contract, and acting within their authority, make an award, which

[2] [1959] 1 W.L.R. 142; [1959] 1 All E.R. 43.
[3] [1894] A.C. 535; 10 T.L.R. 636.
[4] [1909] 1 K.B. 901; 25 T.L.R. 370.
[5] [1914] A.C. 461; 30 T.L.R. 313.
[6] [1897] A.C. 59; 13 T.L.R. 58.
[7] [1909] 1 Ch. 163; 25 T.L.R. 107.
[8] (1801) 2 Bos. & P. 371.
[9] [1919] 1 K.B. 491.
[10] [1953] 1 W.L.R. 563; [1953] 1 All E.R. 843.

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is not ex facie turpis or illegal, or obviously in unreasonable restraint of trade, the parties are bound by such award, subject to their rights to move the court to remit the matter to the arbitrators, or to set the award aside for misconduct of the arbitrators, under sections 22 and 23 of the Arbitration Act, 1950. The successful party can apply to the court to have the award made an order of court, or bring an action on the award.

He submits that here is an award within the terms of reference and within the authority of the arbitrators, not tainted by misconduct, and clearly not turpis, and it cannot be said that, ex facie, it is in wrongful restraint of trade. To argue otherwise is to ask the court to act as an appellate court from the arbitrators, which can only be done by case stated. And the strength of the plaintiffs' case is, he says, that they have an award, on its face perfectly legal, and are entitled to the fruits of it. He relies on *Buccleuch (Duke)* v. *Metropolitan Board of Works*.[1]

[His Lordship considered the first four defences raised and the plaintiffs' answers to them, and having found in favour of the plaintiffs on those points, continued:] The fifth defence raised under paragraph 7 of the defence and particulars is that if rule 10 constitutes a valid submission entitling the arbitrators to make an award affecting the defendants' conduct after ceasing membership, the contract between the parties contained in the rules, in particular rule 10, is an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposes on the defendants restrictions after they have ceased membership of the union.

Mr. Gardiner, I think, starts this topic at a disadvantage, because, on the strict wording of the pleading, neither rule 10 nor any other rules, by themselves, can possibly constitute a restraint of trade. The rule, which merely enables a dispute to be settled in a particular way, does not, of itself, restrain anyone. It is not until the award is made that anyone can be restrained, and possibly neither party may be. If anything restrains anyone it is the award, and not the contract or rule which merely prescribes arbitration as the means of obtaining it. However, since I am informed that in any event this case is likely to go to a higher court, I proceed to consider Mr. Gardiner's submissions on the footing that paragraph 7 of the defence, with its particulars, may be regarded as referring to the award, rather than the rule, though for myself I doubt whether they can be so regarded.

Mr. Gardiner submits that a restriction upon the trading activities of the defendants after they have ceased to be members of the union is unreasonable from the point of view of the parties, in that it is not reasonably required for the protection of the plaintiffs and other members of the union, and from the point of view of the public, in that it prevents or might prevent the defendants or others from trading as they please after ceasing

[1] (1872) L.R. 5 H.L. 418.

membership of the union, and that, as a matter of public policy, the courts will take note of it, when asked to enforce an award. He relies in particular on *Joseph Evans & Co. Ltd.* v. *Heathcote* [2] and *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*,[3] in each of which it was a strong feature of the unreasonableness of the restraint that under the rules of the association the party restrained could not in practice withdraw from the association, and would remain indefinitely subject to a restraint which would or might put him entirely out of business. By analogy Mr. Gardiner argues that if, in spite of the right to withdraw from the union, an award is binding on a society after it has ceased membership, it is in the same position as if it had no right to withdraw. He also relies on *Hylton* v. *Eckersley* [4] and *Kores Manufacturing Co. Ltd.* v. *Kolok Manufacturing Co. Ltd.*,[5] and he finally submits that it is obviously unreasonable, both from the parties' and the public points of view, that the defendants should be precluded for ever from continuing to serve the public in an area where they have served for 65 years.

In reply to this strong argument, Sir Frank Soskice, as to the last matter, points out that it just is not so. The final award does not restrict the defendants from rendering co-operative service in Springwell Ward, where they have traded since 1891, and it is precisely because of this that the plaintiffs took steps to have the first award remitted to the arbitrators to have their obvious and admitted error as to the defendants' sphere of activities corrected. But in Great Usworth Ward, until 1956 (when the defendants opened their new shop) the most that they ever did was to deliver goods in vans to customers who lived there but who had ordered goods in the Springwell shop, and they never traded from mobile shops; whereas the plaintiffs at all material times not only delivered goods in vans to their customers who lived in Great Usworth, ordered from their original shop opened in 1873, but probably also did considerable trade from mobile shops. He therefore submits that the award does not seek to curtail the trade which the defendants have carried on since 1891, but only an extension thereof into Great Usworth Ward, which until 1956 they did not enjoy.

As regards Mr. Gardiner's main submission, Sir Frank points out that all of the four cases relied on were actions brought in the courts upon or to impeach agreements containing restrictive terms; whereas this is an action on an award which prima facie the plaintiffs are entitled to enforce. The parties by becoming members of the union agreed to the particular method of settling disputes, and although the defendants were unco-operative in the arbitration, the award was lawfully obtained, and, not being ex facie illegal, the courts will not look behind it, and the defendants

[2] [1918] 1 K.B. 418; 34 T.L.R. 247.

[3] [1919] A.C. 548; 35 T.L.R. 354.

[4] (1855) 6 El. & Bl. 47, 66.

[5] [1958] Ch. 108; [1958] 2 W.L.R. 858; [1957] 3 All E.R. 158.

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are bound by it. He relies on *Caledonian Railway* v. *Turcan*,[6] *Elves* v. *Crofts*,[7] and on the judgment of Lord Guest in *Bellshill and Mossend Co-operative Society Ltd.* v. *Dalziel Co-operative Society Ltd.*[8]: see also *Delver* v. *Barnes*[9] and *Wohlenberg* v. *Lageman*.[10] As regards *McEllistrim* v. *Ballymacelligott Co-operative Society*,[11] Sir Frank points out that the co-operative society was there seeking to protect itself against competition generally, at the expense of a trader who, by virtue of the restriction, would be put completely out of business. Here, he contends, the plaintiffs are not seeking to put the defendants out of business, which they are free to carry on in their own area, as formerly, and they are not seeking to defeat competition generally; indeed, they have many other ordinary shopkeepers in the district who compete with them. They are only seeking, within the principles of the co-operative movement, to protect themselves and their customers (the public) from the waste of labour caused by unregulated competition within the co-operative movement itself, by securing stability in their list of customers in a particular area. They are not seeking to enrich themselves, since any additional profits effected from saving waste are returned to their members by way of dividend. And, finally, as regards the question of the absence of a time limit and the award being binding on the defendants after withdrawal from membership, he relies strongly on *Palmolive Co. (of England)* v. *Freedman*,[12] where Lawrence L.J. said: "I now propose to deal "with the defendant's main objections. In support of his first "objection—namely, the absence of a time limit and of a power "of withdrawal—the defendant relied strongly on the decision of "the Court of Appeal in *Joseph Evans & Co.* v. *Heathcote*.[13] "That case, however, is clearly distinguishable from the present "on the ground that the agreement there (as pointed out by "Bankes L.J.[14]), provided for a state of things which might "result in the shutting down altogether of the plaintiffs' manu-"facture. The plaintiffs were manufacturers of case tubes, and "by the agreement they had purported to bind themselves not to "sell their output except to five named persons, none of whom "was under any obligation to buy and all of whom might cease "to exist. In these circumstances, it is perhaps not to be "wondered at that the court came to the conclusion that the "absence both of a time limit and of a power of withdrawal "rendered the restraint unreasonable in the interests of the "parties. No such considerations enter into the present case, as "the agreement here could not by any stretch of imagination lead "to any such result. Moreover, the insertion of a time limit or

[6] [1898] A.C. 256.
[7] (1850) 10 C.B. 241.
[8] An interlocutory judgment, dated July 25, 1958.
[9] (1807) 1 Taunt. 48.
[10] (1815) 6 Taunt. 251.
[11] [1919] A.C. 548.
[12] [1928] 1 Ch. 264, 284, 285; 44 T.L.R. 86.
[13] [1918] 1 K.B. 418.
[14] Ibid. 430.

"of a power of withdrawal in such an agreement as the present "would not only be unusual and unbusinesslike, but would "defeat the object in view. In price maintenance agreements "such as this the object of the manufacturer or seller is that the "prices should be maintained so long as his particular goods are "manufactured or sold, and I know of no case where such an "agreement has contained any such limit or power. If a time "limit or power of withdrawal were inserted in such an agree-"ment, a manufacturer or seller might find himself ruined after "having expended large sums of money in building up a profitable "trade."

In my judgment, Sir Frank Soskice's argument is correct. There is nothing on the face of the award to indicate that it is an unreasonable restraint of trade, against the interests of the parties or the public. And in my view, I am not entitled to look behind the award and become in effect an appellate tribunal from the arbitrators. The defendants have only their own stubborn attitude to blame for not taking the proper steps to oppose the plaintiffs' claim before the arbitrators, if, indeed, they had any grounds for doing so. In my view, the defendants are not being restricted from carrying on business as they did before 1956, but it is not unreasonable, in the interests of economical co-operative trading and in the interests of the public, to prevent their extension to an adjacent area. This is not a case of a mere barrier against competition for its own sake, but a means of confining co-operative trading in a particular area to one society, so that greater benefit may result to the buying public. The plaintiffs are financially able to provide exclusively the co-operative needs of the area, which under the award they are bound to do.

[His Lordship then dealt with the plea of laches, and continued:] The seventh defence raised is under paragraph 12 of the defence, that the Co-operative Union Ltd. is a trade union within the meaning of the Trade Union Acts, 1871–1913, and the defendants rely upon section 4 of the Act of 1871 as a bar to the action.

[His Lordship read section 4 of the Act of 1871 and continued:] Under this section Mr. Gardiner first submits that the co-operative union is a trade union. The definition of a trade union within the meaning of section 4 is to be gathered from section 23 of the Trade Union Act, 1871, section 16 of the Trade Union Act Amendment Act, 1876, and sections 1 (2) and 2 (1) of the Trade Union Act, 1913. The original definition in section 23 of the Act of 1871 was repealed by section 16 of the Act of 1876, except the proviso (which does not arise in this case). By section 2 (1) of the Act of 1913, a "trade union" means any combination, the principal objects of which are under its constitution "statutory objects." The latter expression is defined in section 1 (2) as meaning the objects mentioned in section 16 of the Act of 1876 (plus one extra not material to this case). Section 16 of the Act of 1876 therefore defines a "trade union"

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for the purposes of this case as: "any combination, whether "temporary or permanent, for regulating the relations between "workmen and masters, or between workmen and workmen, or "between masters and masters, or for imposing restrictive con-"ditions on the conduct of any trade or business, whether such "combination would or would not, if the principal Act had not "been passed, have been deemed to have been an unlawful "combination by reason of some one or more of its purposes being "in restraint of trade," with the qualification added by the Act of 1913 that these must be the principal objects of the combination.

Mr. Gardiner submits that the co-operative union is a "trade "union" within this definition because it is a combination for regulating the relations between masters and masters, and for imposing restrictive conditions on the conduct of their trade or business, which, he says, is one of their principal objects under rule 2.

Secondly, Mr. Gardiner contends that rule 10 constitutes an agreement between members, as such, concerning conditions on which they as members for the time being should sell or not sell their goods. Here, he says, the conditions "imposed" are that the defendants are not to sell from shops or vans in the Washington area, other than Springwell Ward.

Thirdly, Mr. Gardiner submits that an action on an award in an arbitration under the rules is a proceeding instituted with the object of directly enforcing an agreement contained in such rules.

He relies on *Edinburgh Master Plumbers Association* v. *Munro*,[15] where, under the rules of an association, members who successfully tendered for contracts had to pay a percentage into the funds of the association. When a claim was made against a member under the rules, and the claim was disputed, an "ad "hoc" agreement was made between the parties referring the dispute to arbitration. In a subsequent action upon the award by the successful association, it being admitted and not being argued to the contrary that the association was a trade union, it was held that, although the original claim directly under the rules would have been barred by section 4 of the Act of 1871, no such restriction affected the claim under the award, based upon a new and independent agreement to refer the dispute to arbitration. Mr. Gardiner contends that had the original rule referred any dispute to arbitration the action would likewise have been barred, and was only saved by the specific reference to arbitration. He submits, therefore, that this action is a proceeding instituted with the object of directly enforcing an agreement between members of a trade union, as such, concerning conditions on which they, as members for the time being, shall or shall not sell their goods.

For the plaintiffs' answers to these submissions I am greatly indebted to Mr. MacCrindle, who, in the unavoidable absence of

[15] 1928 S.C. 565.

his leader, argued the plaintiffs' case on this point with conspicuous ability and clarity. As to Mr. Gardiner's first submission that the co-operative union is a trade union, Mr. MacCrindle, by way of introduction, indicated a neat "pointer" (which he did not claim was conclusive), namely that, by section 5 of the Act of 1871, the Industrial and Provident Societies Act, 1867, and any Act amending it (which includes the Act of 1893) do not apply to any trade union, and the registration of any trade union under, inter alia, the Act of 1893 shall be void. Of course the Registrar of Friendly Societies may make a mistake, but it is at least interesting that the registrar has, in fact, registered the Co-operative Union Ltd. as an industrial and provident society under the Act of 1893, which he would be wrong to do if it were a trade union.

Mr. MacCrindle's first main point is that the union is not, under the first leg of the definition in section 16 of the Act of 1876, a "combination for regulating the relations between masters "and masters." The fact that it consists of member societies who can only carry on their business by employees does not make it a combination of masters nor, under section 4 of the Act of 1871, an agreement between members of a trade union as such. He contends that it is simply a combination of traders. As to that, in my judgment, he is right.

Secondly, he also submits that under the second leg of the definition in section 16 of the Act of 1876, the union is not a "combination for imposing restrictive conditions on the conduct "of any trade or business." The operative word is "imposing." The union, he contends, does not impose anything. The objects of the union under rule 2 are to carry on the specified activities with a view to propagating co-operative principles and ideas and organising co-operative work, with a view to the ultimate establishment of a co-operative commonwealth. Mr. MacCrindle emphasises that under rule 6 no society, company or body can be admitted as a member unless it is already one which has for its object the promotion of co-operative principles and ideas. Therefore, he contends, the union does not impose on its members anything which is not there already. Its object is to encourage, not to impose, basic ideals on those who already have them, and to assist in their organisation. He relies on Lord Sumner's remarks in *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.*[16] In this also, in my judgment, he is correct.

Thirdly, he submits further under this head that, even if rule 10 imposes restrictive conditions, it is not a "principal "object" as required by section 2 (1) of the Act of 1913. He contends that arbitration is not a principal object of a federation of societies believing in the same trading ideal, the main aim of which is to distribute profits among its customers. It is purely ancillary to the principal object that, in default of local settlement,

[16] [1924] A.C. 1, 25; 40 T.L.R. 52.

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disputes are to be settled by arbitration. No society joins the union for the purpose of benefiting by arbitration. He asks: "How can mere machinery for achieving an object be a principal "object in itself?"

Although rule 2 states that acting as arbiters in matters of dispute between societies is one of the objects of the union, I agree with Mr. MacCrindle that it is not a principal object, as laid down in section 2 (1) of the Act of 1913. Indeed, I do not think it is an object at all in itself, so much as the mere means of achieving the principal objects of the union.

On these three grounds, therefore, in my judgment, Mr. MacCrindle is correct in his submissions under the first head, and I do not think that the Co-operative Union Ltd. is a "trade "union" within the meaning of section 4 of the Trade Union Act, 1871, as amended by the Acts of 1876 and 1913. And therefore Mr. Gardiner's submission that the action is barred by section 4 fails.

I would add that I was less impressed by Mr. MacCrindle's submissions under Mr. Gardiner's second and third points. I incline to think that, if rule 10 does impose restrictions, they are restrictions "concerning the conditions on which members shall "or shall not sell their goods or transact business" within section 4 of the Act of 1871, or "restrictive conditions on the "conduct of their trade or business" within section 16 of the Act of 1876. I think that the area of their operations, as well as the venue (whether from shops or vans), is as much part of the "conditions" or "conduct" of their business as the "terms of "business," such as prices or division of profits. Again, if rule 10 does impose restrictions, an action on an award may well amount to a proceeding instituted with the object of directly enforcing an agreement concerning such restrictive conditions, if, as in this case, in addition to seeking a declaration as to their rights, the plaintiffs pray an injunction to enforce them. Mr. MacCrindle may be right in his submission that there is a distinction between a declaration as to rights, and enforcing a legal remedy. Here the plaintiffs are seeking both. But in any event, as I have already found, I do not consider that rule 10 contains any restrictive condition at all, and it is not until the award is made that any question of restriction arises.

Mr. MacCrindle also raised the interesting point that, in any event, inasmuch as section 4 is prefaced by the words "Nothing "in this Act shall enable," etc., there is nothing to prevent the plaintiffs from enforcing their rights at common law, and, therefore, provided that the award is not ex facie illegal as a restraint of trade, as I have already found it is not, the plaintiffs are left to their common law remedy, unaffected by section 4 of the Act of 1871. I need express no view about this.

He also raised the point that, in any event, section 4 only applies to agreements between "members for the time being of

"such trade union," and therefore if, as I have found, the parties are bound even after ceasing to be members, it is not an agreement between members "for the time being." Again I need express no opinion. For, as already stated, I find that the Co-operative Union Ltd. is not a "trade union," and therefore paragraph 12 of the defence does not arise.

In the result, the plaintiffs succeed in this action, and are entitled to the declaration asked for. With regard to the claim for an injunction, it was argued by Mr. Gardiner on the authority of *Davies* v. *Davies* [17] that the terms of the award are too vague to be enforced by injunction. But the facts of that case were very different, and, in my view, the words of the award are sufficiently specific to be enforceable by injunction.

Accordingly, the claim for an injunction will also be allowed, as prayed, and I shall direct an inquiry as to damages.

Judgment for the plaintiffs.

Solicitors: *Herbert Reeves & Co. for William Mark Pybus & Sons, Newcastle-upon-Tyne; Sharpe, Pritchard & Co. for Watson, Burton, Booth & Robinson, Newcastle-upon-Tyne.*

C. J. E.

[17] (1887) 36 Ch.D. 359.

[CHANCERY DIVISION.]

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[1958 P. No. 1727.]

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Jan. 12, 13, 14; *Feb.* 10.

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Revenue — Estate duty — Property chargeable — Immovable property situate outside Great Britain—Settlement—Testamentary disposition—Whether property excluded for estate duty purposes from property passing on death of tenant for life—Proper law of disposition—Finance Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 47), *s.* 28 (2).

Conflict of Laws—Immovable property—Assignment—Will—Settlement—Trust for sale—Proper law.

Revenue—Estate duty—Practice—Determination of liability as to estate duty—Desirability of agreed statement of points of law—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 36), *s.* 3.

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person "shall be deemed for the purposes of estate "duty not to include any property passing on the death which is "situate out of Great Britain if . . . the proper law regulating "the devolution of the property so situate, or the disposition under "or by reason of which it passes, is the law neither of England nor "of Scotland and . . . (*c*) that the property . . . is, by the law of "the country in which it is situate, immovable property."

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By his will made in English form, a testator, having declared that, inasmuch as he had an English domicile, his will should operate as far as the case admitted according to English law, devised certain property in England, defined in the will as his "settled estates," to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator devised and bequeathed the residue of his estate to his trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his "settled estates." The testator died on May 17, 1908, domiciled in England. His wife died on December 22, 1930; and his eldest son on September 23, 1954.

The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained. On the question whether the land in South Africa, which was by the law of South Africa immovable property, was, by virtue of section 28 (2) of the Finance Act, 1949, excluded, for estate duty purposes, from the property passing on the death of the testator's son:—

Held, (1) that on the true construction of section 28 (2) of the Finance Act, 1949, "devolution" meant a devolution by law such as kinship, and "disposition" a disposition by instrument; and that, accordingly, on the death of the testator's son, the South African property passed under a disposition, the testator's will, and not by devolution.

Earl of Zetland v. *Lord Advocate* (1878) 3 App.Cas. 505 and *Duke of Northumberland* v. *Attorney-General* [1905] A.C. 406; 21 T.L.R. 639 applied.

(2) That the proper law regulating a testamentary disposition of foreign land was not necessarily the lex situs but depended upon the intention of the testator as ascertained from the construction of the disposition in the light of all the surrounding circumstances; and that, on the true construction of the will, having regard, in particular, to the blending of the whole of the residue into one mass, to be held as if it were part of his English "settled estates," the intention of the testator was that English law should govern the whole of his disposition. Accordingly, the South African property was not excluded for estate duty purposes from the property passing on the death of the testator's son.

Duke of Marlborough v. *Attorney-General* (*No. 1*) [1945] Ch. 78; 61 T.L.R. 159; [1945] 1 All E.R. 165, *Attorney-General* v. *Johnson* [1907] 2 K.B. 885 and *Attorney-General* v. *Belilios* [1928] 1 K.B. 798; 44 T.L.R. 214 considered.

Observations as to the desirability of an agreed statement of points of law in proceedings under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

Adjourned summons.

By his will, dated March 14, 1898, the testator, Sir Frederic Samuel Philipson Philipson-Stow, declared, by clause 2, that "inasmuch as I have an English domicile it is my wish and "intention that this my will and any codicil I may make shall be "construed and operate as far as the case admits according to "the law of England." Having appointed executors and trustees, the testator, by clause 4 of the will, devised his Blackdown Estate near Fernhurst in the county of Sussex, defined as "my settled

"estates," to the use of his wife for her life with remainder to his trustees for a term of 100 years upon trusts which had long since come to an end, with remainder to the use of his eldest son, Sir Elliot Philipson Philipson-Stow, for his life, with remainder to the use of the first and every other son of his eldest son in tail male with remainders over. By clause 5, he directed that, if any person to whom an estate in tail male was limited was born in his lifetime, the estate tail was to be cut down to a life interest.

By clause 25, the testator devised and bequeathed all his real and personal estate whatsoever and wheresoever situate or being either in the United Kingdom or in South Africa, to his trustees upon trust for sale and conversion, with full power and discretion to postpone sale or conversion, and directed them out of the proceeds of sale and conversion to pay his funeral and testamentary expenses and debts, and the legacies and annuities bequeathed by his will or any codicil and to invest the residue at their discretion. Subsequent clauses of the will contained directions to the trustees to set aside out of the residuary estate portions for daughters and younger sons; and by clause 37, the testator provided that "The ultimate residue of the said invest-"ments representing my said residuary estate after setting apart "and appropriating the several funds aforesaid for the benefit "of my daughters and younger sons shall be held by my trustees "upon the trusts following (that is to say) Upon trust after "providing thereout if need be for such keeping up and repair of "my said mansion house and settled estates as aforesaid to pay "the annual income thereof to my said wife during her life she "maintaining and educating and keeping a home for my sons "and daughters And after her death such ultimate residue shall "be held by my trustees as if the moneys or investments repre-"senting the same were capital moneys arising under the Settled "Land Acts 1882 to 1890 from my said settled estates."

Clause 39 contained wide powers for the investment of capital money in the usual trustee securities; and, in addition, on the stocks, funds, shares or securities of any corporation, company or public body, municipal, commercial or otherwise, in the United Kingdom, the Colonies of the Cape of Good Hope, Natal, Dominion of Canada or Australasia or in the Orange Free State or Transvaal Republic, and to invest on the security of real estate in any of those Colonies or States. Clause 42 gave the trustees wide powers of managing and cultivating the real leasehold and immovable property whether in England or abroad thereinbefore devised and bequeathed in trust for sale with all the powers of absolute owners; and clause 44 gave power to delegate to trustees resident in Cape Colony or elsewhere abroad the execution of the trusts or powers in Cape Colony or elsewhere abroad.

The testator died on May 17, 1908, resident and domiciled in England. At the date of his death he owned a five-tenths undivided interest in farm property, known as "Steenbokspan,"

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in the Union of South Africa. The executors and trustees paid the legacies and made provision for the daughters' and younger sons' portions. They retained, in exercise of their power to postpone sale, and at the date of the hearing still retained, the land at Steenbokspan. The income arising from that land had been paid to the testator's widow during her life and, after her death on December 22, 1930, to the testator's eldest son. He died on September 23, 1954, and was succeeded in the enjoyment of the settled estate and capital moneys by his son, Sir Frederic Lawrence Philipson-Stow.

On August 25, 1958, the trustees took out a summons under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to determine, inter alia, whether the share in the land at Steenbokspan now forming part of the testator's residuary estate ought to be treated for the purposes of estate duty as excluded, by virtue of section 28 (2) of the Finance Act, 1949,[1] or otherwise, from the property passing on the death of his son, or ought to be treated as passing on such death.

R. Cozens-Hardy Horne for the plaintiffs.
John Pennycuick Q.C. and *E. Blanshard Stamp* for the Crown.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Parr* v. *Parr* [2]; *In re Hoyles* [3]; *In re Twopeny's Settlement* [4]; *In re Cutcliffe's Will Trusts* [5]; *Midleton* v. *Cottesloe* [6]; *In re Austin Motor Co. Ltd.'s Policies.* [7]

Cur. adv. vult.

February 10. Upjohn J. The first question on this summons is concerned with the liability to estate duty of a foreign immovable which is subject to the trusts of a settlement created by the will, dated March 14, 1898, of the testator, Sir Frederic Samuel Philipson Philipson-Stow, who died on May 17, 1908, resident and domiciled in England. The immovable in question is a farm

[1] Finance Act, 1949, s. 28 (2): "As respects property passing on the "death of a person dying after the "commencement of this Part of this "Act, subsection (2) of section two "of the Finance Act, 1894 (which "exempts from estate duty property "situate abroad and not chargeable "with legacy duty or succession "duty), and section twenty-four of "the Finance Act, 1936 (which "restricts the exemption conferred by "the said subsection (2)), shall not "have effect; but that property shall "be deemed for the purposes of estate "duty not to include any property "passing on the death which is "situate out of Great Britain if it is "shown that the proper law regulating the devolution of the property "so situate, or the disposition under "or by reason of which it passes, is "the law neither of England nor of "Scotland and that one at least of "the following conditions is satisfied, "namely,— . . . (c) that the property so situate is, by the law of "the country in which it is situate, "immovable property."

[2] (1833) 2 L.J.Ch. 167.

[3] [1911] 1 Ch. 179; 27 T.L.R. 131.

[4] [1924] 1 Ch. 522.

[5] [1940] Ch. 565; 56 T.L.R. 537; [1940] 2 All E.R. 297.

[6] [1949] A.C. 418; 65 T.L.R. 254; [1949] 1 All E.R. 841.

[7] [1951] Ch. 1081; [1951] 2 T.L.R. 235.

property known as "Steenbokspan," situate in the Union of South Africa. At the date of his death the testator owned a five-tenths undivided interest in this property. Since his death, there have been certain changes and partitions; and the property now consists of a seven-eighths interest in a slightly smaller area of the farm. Nothing turns on this, however, or on the fact that the interest is an undivided share in land, because the argument of both sides has proceeded upon the footing, solely, that the property is an immovable situate outside the United Kingdom.

The claim to duty arises on the death of a tenant for life under the trusts of the testamentary settlement, namely, the testator's eldest son, Sir Elliot Philipson Philipson-Stow, who died on September 23, 1954.

[His Lordship referred to the clauses of the will, as set out above, and continued:] The executors and trustees duly got in the residuary estate, paid all debts and legacies, and have made full provision for the younger sons' and daughters' portions. They have retained, and still do retain, the land at Steenbokspan in exercise of their discretion to postpone sale. The income arising from this land was paid to the testator's widow during her life and, after her death on December 22, 1930, to his son, who was succeeded by his son, the second Sir Frederic, in the enjoyment of the settled estates and capital moneys. The fee tail to this Sir Frederic was cut down to a life interest in accordance with the provisions of clause 5 of the will.

Liability to duty of a foreign immovable is now governed by section 28 of the Finance Act, 1949, but, before turning to that section, I propose to make some reference to the history of estate duty legislation in connection with foreign property. By section 2 (2) of the Finance Act, 1894, property passing on the death of a deceased when situate out of the United Kingdom was exempt from duty unless, under the law then in force, legacy or succession duty was payable in respect thereof. For the purposes of this case, it throws one back to section 2 of the Succession Duty Act, 1853. That defined the terms "successor" and "predecessor," and provided that every past or future disposition of property by reason whereof any person had or should become beneficially entitled to any property or the income thereof upon the death of any person, and any devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person to any other person in possession or expectancy, should be deemed to have conferred or to confer on the person entitled by reason of such disposition or devolution a "succession," and the term "successor" should denote the person so entitled, and the term "predecessor" should denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor was derived.

It was soon decided that some limitation must be placed on the very wide generality of the words used in the Act; and in

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Wallace v. *Attorney-General*[1] Lord Cranworth L.C. decided[2] that the Act only operated to tax persons "who become entitled "by virtue of the laws of this country."

Section 2 of the Act was considered in a number of authorities in the House of Lords. In *Earl of Zetland* v. *Lord Advocate*,[3] Lord Hatherley pointed out[4] that the section contemplated two classes of cases where the succession might be claimed, namely, a disposition by the instrument under which he claimed or a devolution by law such as heirship or kinship. Lord Macnaghten, in *Duke of Northumberland* v. *Attorney-General*,[5] pointed out that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property could pass, whether by act of parties or by act of law.

The position with regard to estate duty on foreign property was amended by the Finance Act, 1936; but still depended principally upon liability to succession duty.

The Finance Act, 1949, abolished succession duty and so new legislation for the limiting of claims to estate duty upon foreign property became necessary in justice to the subject. That led to section 28 (2), the relevant parts of which I will now read. "(2) As respects property passing on the death of a person dying "after the commencement of this Part of this Act, subsection (2) "of section two of the Finance Act, 1894 (which exempts from "estate duty property situate abroad and not chargeable with "legacy duty or succession duty), and section 24 of the Finance "Act, 1936 (which restricts the exemption conferred by the "said subsection (2)), shall not have effect; but that property "shall be deemed for the purposes of estate duty not to include "any property passing on the death which is situate out of "Great Britain if it is shown that the proper law regulating "the devolution of the property so situate, or the disposition "under or by reason of which it passes, is the law neither of "England nor of Scotland and that one at least of the following "conditions is satisfied, namely"—and I go straight to condition (*c*): "that the property so situate is, by the law of the "country in which it is situate, immovable property."

Mr. Pennycuick, for the Crown, concedes that condition (*c*) is satisfied. It seems to me reasonably clear that the draftsman of this subsection had in mind the terms of the old Succession Duty Act and the judicial comments thereon; and that, in using the words "proper law," "disposition" and "devolution," he was really following the general scheme of the old Act as interpreted in the courts. In my judgment, "disposition" in the subsection means a disposition by instrument; and "devolution" means a devolution by law such as kinship. These are true alternatives and are together exhaustive. I do not accept Mr.

[1] (1865) 1 Ch.App. 1.
[2] Ibid. 1, 9.
[3] (1878) 3 App.Cas. 505.
[4] Ibid. 505, 511.
[5] [1905] A.C. 406, 410; 21 T.L.R. 639.

Horne's argument that a passing might be both a devolution and a disposition; it is one or the other. The fact that, unlike the Succession Duty Act, the subsection does not speak of a "devolution by law" but only of a "devolution" is, in my view, explained by the context of the language used in the subsection.

Even if a wider meaning be given to "devolution" as suggested, it does not seem to me to advance the argument, for the question: How does it devolve? must inevitably bring the answer: By the testator's testamentary disposition.

However, it seems to me to be perfectly clear that, in the case before me, the property passed on the death of his son, under or by reason of a disposition (the testator's will) and not by devolution.

The question, therefore, which I have to determine is what is the proper law of the testator's will concerning the Steenbokspan farm?

The term "proper law," though very familiar in commercial contracts for many years, seems first to have been used in connection with contractual settlements by Lord Greene M.R. in *Duke of Marlborough* v. *Attorney-General* (*No. 1*).[6] He compared as precisely analogous the proper law of a contractual settlement with the law of the domicile in the case of a testator. In that case, however, Lord Greene was principally concerned to show that the true test in connection with liability to duties in the case of a settlement was the proper law of the settlement and not the forum for proceedings. It has not been suggested before me that the domicile of the testator is by itself decisive of the question I have to determine.

In the case of a settlement, the *Marlborough* case[6] clearly decided that the proper law was a matter of the mutual intention of the parties to be ascertained from the terms of the settlement in the light of all relevant and admissible surrounding circumstances.

In the case of a will, what is meant by its proper law? In my view, it is really in the nature of a modern statement of the test propounded by Lord Cranworth in *Wallace* v. *Attorney-General*[7] in the light of the later authorities, e.g., see *Attorney-General* v. *Belilios*,[8] from which I quote later; and I do not think that the parties seriously dispute that the proper law means the law which the testator must have intended to govern the relevant disposition in the will, but there they part.

Mr. Horne, for the subject, put his case in two ways. First, he said that the proper law governing the disposition of a foreign immovable must necessarily be the lex situs; and, secondly, he submitted that, if that be not so, yet upon the true construction of this will the proper law was the law of the Union of South Africa in relation to the farm situate there.

[6] [1945] Ch. 78, 83; 61 T.L.R. 159; [1945] 1 All E.R. 165.

[7] 1 Ch.App. 1, 5.

[8] [1928] 1 K.B. 798; 44 T.L.R. 214.

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Upon the first point he really based his case on the well-known rule relating to immovables to be found in Dicey's Conflict of Laws, 6th ed. (1949), p. 529, which I will read: "127. All rights "over, or in relation to, an immovable (land) are (subject to the "exceptions hereinafter mentioned) governed by the law of the "country where the immovable is situate (lex situs)." The rule was approved by Maugham L.J. in *In re Anziani*.[9] Mr. Horne submitted rightly that all questions of transmission on death of foreign land must be decided by the lex situs, as must the rights of succession. Thus, all questions of succession on intestacy and the validity of any testamentary disposition of foreign land must necessarily be determined by the lex situs, as must the incidence of enjoyment of such lands: see, for example, *In re Moses* [10] and *In re Miller*,[11] *per* Warrington J.[12]

Mr. Horne also relied on the decision of Russell J. in *In re Berchtold*,[13] who held that the succession on intestacy to proceeds of sale of English land held on trust for sale but not yet sold is determined by the lex situs, and not by the domicile of the intestate.

So he submitted that, although the foreign land is held on trust for sale, you must look at realities; and you find, in fact, foreign land the succession to which must necessarily be governed by the lex situs; and the testator must have intended that law to be the proper law of the disposition.

The Crown's case on the first point may simply be stated thus. The question of the proper law depends upon the testator's intention, which you must ascertain in accordance with the principles laid down in the *Marlborough* case [14]; that is to say, upon the true construction of the will, in the light of all admissible surrounding circumstances, what is the law which the testator has chosen to apply to his disposition of the Steenbokspan farm? It matters not, Mr. Pennycuick submitted, that on a death the title to foreign land, and the validity of the dispositions in the will concerning that land, must necessarily depend on the lex situs. Counsel concedes that you cannot create by will rights in relation to foreign land which are inconsistent with the local law; but that, he submits, does not preclude the settlor from choosing the law of another country to govern his dispositions in relation to that land so far as those dispositions are valid.

He points out that in commercial contracts the proper law may be that of this country, though it relates to rights and obligations with regard to a contract to grant a mortgage in a foreign country: *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.*[15]

He relies strongly on *Attorney-General* v. *Johnson*,[16] which, he submits, really covers the case. In that case, a testator domiciled in England, left the residue of his real and personal

[9] [1930] 1 Ch. 407.
[10] [1908] 2 Ch. 235.
[11] [1914] 1 Ch. 511.
[12] Ibid. 511, 579.
[13] [1923] 1 Ch. 192.
[14] [1945] Ch. 78.
[15] [1910] 2 Ch. 502.
[16] [1907] 2 K.B. 885.

estate, which included a tea estate in Assam, to trustees upon trust for sale and conversion, and to pay certain annuities, and to pay the surplus income to certain named persons and to the survivors of them in equal shares. The trustees, under a power contained in the will, retained the Assam estate. On the death of two of those entitled to surplus income, the question arose as to succession duty, and therefore estate duty, on shares of income accruing to the survivors. Bray J. held [17] that the Assam estate, being held on trust for sale, must be treated as property in this country and liable to duty. I am not going to quote from the judgment, for, as Sir Wilfrid Greene M.R. pointed out in *In re White*,[18] the grounds of the decision are not clearly expressed. It does not bind me for it was a decision on a different Act. Furthermore, the Crown, through Mr. Pennycuick, has expressly disclaimed any reliance on that part of the judgment which treated the property in Assam as an English chose in action. However, as a matter of decision, it is of great persuasive authority, for it was quoted without disapproval by Sargant and Lawrence L.JJ. in *Attorney-General* v. *Belilios*,[19] and described during the course of argument by Lord Hanworth M.R.[20] as a very plain case. Sargant L.J. said [21]: "In *Attorney-General* v. "*Johnson* [22] the succession held taxable was in property in Assam "remaining unsold, but the succession was created by an English "will devising the property to English trustees upon trust to sell "and hold for beneficiaries here. The law creating and governing "the trust was English." And Lawrence L.J. said [23]: "*In re* "*Cigala's Settlement Trusts* [24] and *Attorney-General* v. *John-*"*son* [25] are cases where the trusts were established by persons "domiciled in England and were English settlements from the "moment when they were made, therefore constituting disposi-"tions under which the beneficiaries claimed title by virtue of "the laws of England."

The test laid down by the Act is that of the proper law of the disposition; and, in my judgment, that is essentially a question of the intention of the testator to be ascertained upon the true construction of the disposition in the light of all the relevant surrounding circumstances. I do not accept the submission that proper law of a testamentary disposition of foreign land must necessarily be the lex situs. That certainly is not true of contracts relating to foreign land: see, for example, Exception 1 to Dicey's Rule 127 [Dicey's Conflict of Laws, 6th ed. (1949), p. 541]; and I see no reason why a different rule should apply to a testamentary disposition. Furthermore, it would be quite inconsistent with the observations of Sargant and Lawrence

[17] [1907] 2 K.B. 885.
[18] [1939] Ch. 131, 141; [1938] 2 All E.R. 691.
[19] [1928] 1 K.B. 798.
[20] Ibid. 809.
[21] Ibid. 821.
[22] [1907] 2 K.B. 885.
[23] [1928] 1 K.B. 798, 827.
[24] (1878) 7 Ch.D. 351.
[25] [1907] 2 K.B. 885.

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L.JJ.[26] which I have just quoted, both of whom plainly recognised that English law might govern a testamentary disposition of foreign land. It is, as I have said, a question of construction of the will in the light of all the surrounding circumstances.

I turn then to Mr. Horne's second point that, on the true construction of the testator's will, the proper law in relation to the Steenbokspan land is the lex situs. He submitted that there was no effective trust for conversion, for such a trust is only interposed to regulate the rights of the beneficiaries inter se and there is no conflict here. He drew attention to the undoubtedly very wide power to postpone sale and to manage and delegate management; and also to the wide powers of reinvestment in South Africa. He pointed out, rightly, that, if the land were to be sold, the proceeds might be reinvested in a mortgage of land in South Africa. He suggested that upon the true construction of section 73 of the Settled Land Act, 1925, the proceeds might be applied in the purchase of land in South Africa. I do not propose to decide whether that is so or not, but I will assume it to be so.

Nevertheless, looking at the will of the testator as a whole, it seems to me reasonably clear that he wanted English law to govern all the dispositions contained in his will. First, he said so in clause 2, "so far as the case admits." Secondly, he wanted all his residuary estate wherever situate to be sold and applied first to pay legacies and make provisions for younger children, next to provide an income for the upkeep of his mansion house and the maintenance of his wife and, finally, the residuary moneys were to be treated as capital moneys arising from "my settled "estates." In my judgment, the testator has shown quite clearly that he really wanted everything, after providing for legacies and younger children, to go in one mass as capital moneys for the benefit of his English settled estate; and that seems to me the strongest possible reason for coming to the conclusion that the testator intended English law to govern the whole of his dispositions, notwithstanding the very wide administrative powers and discretions conferred on the trustees.

Mr. Pennycuick in his argument conceded that different testamentary dispositions in the same will might have different proper laws depending upon the true construction of the will. Thus, if a testator devised foreign land to be enjoyed in specie by a number of persons in succession, it must almost necessarily follow that he intended the lex situs to govern the disposition for only by an appeal to such law could the devisees enforce their rights. On the other hand, I would not regard a gift of foreign land to persons in succession, such gift taking the form of vesting the land in trustees for such persons, as necessarily leading to the conclusion that the testator intended English law to apply; it is a question of construction in each case. What seems to me decisive

[26] [1928] 1 K.B. 798, 821, 827.

of this case is the blending of the whole of residue into one mass to be held as part of the testator's English settled estate.

I propose to answer the first question on the summons by saying that the seven-eighth undivided shares in the Steenbokspan estate ought to be treated, for the purpose of estate duty, as included as passing on the death of Sir Elliot.

This summons was taken out under section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, the terms of which make it clear that the subject must be the plaintiff, though the Crown is the claimant. As frequently happens in these cases, the issue of the summons followed long correspondence between the parties in which, apparently, a large number of points of law were taken by the Crown. Mr. Horne, in opening this case, therefore, perfectly properly had to deal with all these points in his opening. When it came to the Crown's turn, all these points, except the two with which this judgment has been concerned, disappeared; and much of Mr. Horne's opening was wasted time through no fault of his own. In my experience, this happens from time to time in estate duty cases. Where, therefore, the argument between the parties has ranged over a large number of points in correspondence, it seems very desirable that the parties should agree before the hearing precisely upon what points they will rely at the hearing. These points can be put into an agreed statement of points of law so that the court and the parties know exactly what issues of law they will have to meet at the trial. The suitable time for this to be done would seem to be when the matter is before the master, before whom it is desirable that counsel should attend to settle the statement where it is necessary.

Order accordingly.

Solicitors: *Norton Rose & Co.; Solicitor of Inland Revenue.*

J. F. L.

[COURT OF APPEAL.]

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Jan. 20, 21, 22; *Feb.* 12.
Jenkins, Romer and Pearce L.JJ.

[1956 J. 2142.]

Residence — Company — Income tax — Test of residence — "Superior or "directing authority"—Finance Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 34), *s.* 20 (9).

Three companies, which were wholly owned subsidiaries of A. B. & Co. Ltd., a company resident in the United Kingdom, were at all material times registered and resident in East Africa. The boards of the three subsidiaries were entirely distinct from the board of the parent company but the board of the parent exercised control in matters of policy and in effect told the boards of the African

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subsidiaries what to do and those boards always accepted the instructions and acted accordingly.

The respondent company, also a wholly owned subsidiary of A. B. & Co. Ltd., made certain payments to the African subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax under Case I of Schedule D. It was admitted that if the African subsidiaries were "resident "in the United Kingdom" within the meaning of section 20 (9) of the Finance Act, 1953,[1] then the payments in question were subvention payments which the respondent was entitled to deduct:—

Held, (1) that a company was resident where the superior or directing authority was; that authority being properly exercisable only within the framework of the constitution of the company.

Dicta of Evershed M.R. in *Union Corporation Ltd.* v. *Inland Revenue Commissioners* (1952) 34 T.C. 207, 271; [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646 and of Dixon J. in *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 C.L.R. 15, 241 applied.

Scottish Co-operative Wholesale Society Ltd. v. *Meyer* [1958] 3 W.L.R. 404; [1958] 3 All E.R. 66 and *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.* [1916] 2 A.C. 307; 32 T.L.R. 624 considered.

Statements of principle of Lord Loreburn L.C. in *De Beers Consolidated Mines Ltd.* v. *Howe* [1906] A.C. 455; 5 T.C. 198, of Lord Halsbury in *American Thread Co.* v. *Joyce* (1911–1912) 6 T.C. 1; 28 T.L.R. 233 and of Lord Sumner in *Egyptian Delta Land and Development Co. Ltd.* v. *Todd* [1929] A.C. 1; 44 T.L.R. 747; 14 T.C. 119 explained.

(2) That, as under the constitutions of the African subsidiaries management and control was vested exclusively in the directors in Africa, a residence in the United Kingdom within section 20 (9) of the Finance Act, 1953, could not be attributed to them merely because the parent had usurped directing power.

Decision of Wynn-Parry J. [1958] 3 W.L.R. 504; [1958] 3 All E.R. 186 affirmed.

Appeal from Wynn-Parry J.[2]

At a meeting of the commissioners held on May 15, 17, 18 and 24, 1956, the Unit Construction Co. Ltd. (hereinafter called "Unit") appealed against assessments to income tax made upon it under case I of Schedule D for the year 1953/54 in the sum of £110,000 less £36,388 capital allowances and for the year 1954/55 in the sum of £200,000 less £50,000 capital allowances.

The appeal concerned certain payments made by Unit, which Unit claimed to deduct in computing its profits for the purposes of the assessments under appeal. These payments comprised substantial sums paid to Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. in 1952 and 1953.

The sole question in dispute was whether Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. were, in

[1] Finance Act, 1953, s. 20 (9): "For the purposes of this section "'company' includes any body cor- "porate, but references to a company "shall be taken to apply only to a "company resident in the United "Kingdom and carrying on a trade "wholly or partly in the United King- "dom. . . ."

[2] [1958] 3 W.L.R. 504; [1958] 3 All E.R. 186.

1952 and 1953, companies resident in the United Kingdom within the meaning of subsection (9) of section 20 of the Finance Act, 1953. It was common ground that if they were so resident then the payments in question were subvention payments which Unit was entitled to deduct in computing its profits, by virtue of the said section 20.

The following facts appear from the case stated: Unit was a wholly owned subsidiary of Alfred Booth & Co. Ltd. Booth & Co. (Africa) Ltd., Booth & Co. Ltd., and Bulleys Tanneries Ltd. (which, when necessary to refer to them together, are hereinafter called "the African subsidiaries") were also wholly owned subsidiaries of Alfred Booth & Co. Ltd.

It was admitted on behalf of Unit that the African subsidiaries were at all material times resident in East Africa.

Alfred Booth & Co. Ltd. was a company incorporated and resident in England, and was the parent of a group of ten or more companies trading in many parts of the world. It was incorporated in 1914 to carry on banking, merchanting and manufacturing businesses of all descriptions, and it did carry on a number of businesses in different parts of the world (including in particular building contracting, and businesses connected with the leather industry) all of which it had, by August, 1949, transferred to subsidiary companies incorporated for the purpose. In August, 1949, it adopted a new memorandum of association with the objects of an investment trust company, with power to carry on the business of banking.

The board of directors of Alfred Booth & Co. Ltd. met regularly in London. In addition to the board meetings, a committee of executive directors held weekly meetings in London. The chairman of the board of directors and of the executive committee was J. W. Booth; he had been a director since 1935; in May, 1950, he became a managing director (with special responsibility on the board and on the executive committee for the African subsidiaries); in July, 1952, he became chairman, and at the same time the special responsibility for the African subsidiaries was divided as under:—

J. W. Booth was responsible for their general trading and mining interests; E. Booth (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their building interests; E. W. Espenhahn (another of the directors of Alfred Booth & Co. Ltd.) was responsible for their hide and skin and tanning interests.

The African subsidiaries, which were incorporated in 1948 and 1949 with the objects set out in their respective memoranda of association were:

(a) *Booth & Co. (Africa) Ltd.* Building contracting in East Arica. A mining venture in Uganda. A forwarding agency at Mombasa, which acted principally as agent for the African subsidiaries themselves.

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A merchanting business was carried on as a separate department under the name of Bulleys Trading Company.

(b) *Booth & Co. Ltd.* The business consisted in the earning of commissions by purchasing hides and in the purchase and sale of skins, and was conducted through a number of posts set up in East Africa. In the case of hides, the company acted as agents for Hollander Hyams Ltd. (a company which had no connection with the Alfred Booth & Co. Ltd. group of companies). This part of the business was governed by an agreement dated October 17, 1950, which allowed Booth & Co. Ltd. to supply a limited number of hides to Bulleys Tanneries Ltd. and other tanneries within the Alfred Booth & Co. Ltd. group of companies. In the case of skins the company acted as principals.

(c) *Bulleys Tanneries Ltd.* Manufacturing in Kenya leather for sale locally, and manufacturing or part-manufacturing leather for export to England, where the product was sold on behalf of Bulleys Tanneries Ltd. by Booth & Co. (England) Ltd.

Each of the African subsidiaries was incorporated in Kenya under the Kenya Companies Ordinance and had its registered office in Nairobi. The articles of association of each of them contained provisions placing the management and control of the business in the hands of its directors and providing that directors' meetings might be held anywhere outside the United Kingdom. It was the intention of the directors of Alfred Booth & Co. Ltd. (which intention they thought they had carried out) in forming the African subsidiaries that those companies should be solely resident in Africa in order that their profits could be used for development in Africa without becoming liable to United Kingdom taxation and also in order to forestall any question which might arise in connection with any future nationalisation, particularly of the building industry. It turned out, owing to disturbances in Kenya and other difficulties, that they incurred losses (except for the department known as Bulleys Trading Company, which made profits), and this was a source of great anxiety to Alfred Booth & Co. Ltd. which had sunk considerable sums of money in them, as it reflected on the financial position of the Alfred Booth group of companies as a whole. J. W. Booth, who was brought into the detailed control of the African subsidiaries, on his appointment as a managing director of Alfred Booth & Co. Ltd. in 1950, considered that the situation of the African subsidiaries was becoming so serious that it was unwise to allow them to be managed in Africa any longer, and that their management must be taken over by the directors of Alfred Booth & Co. Ltd. in London. He considered that his principal job was to manage them. The board of directors of Alfred Booth & Co. Ltd., after discussions, decided that as a result of the lack of success of the African subsidiaries they were forced to take over management and control, in order to save their company's investment; at the same time it was their

policy to dispose of all or any of the African subsidiaries' undertakings if the opportunity should arise. There was at no time any formal agreement with the African subsidiaries that the directors of Alfred Booth & Co. Ltd. should manage them; the intention of the said directors to do so was communicated to one P. Meinertzhagen (the chairman of the board of directors of each of the African subsidiaries), and accepted by him. As a result, from 1950 onwards the directors of Alfred Booth & Co. Ltd. in London began to intervene in the affairs of the African subsidiaries in the manner hereinafter set forth; they were aware that their action in so doing might affect the question of the residence of the African subsidiaries and their liability to United Kingdom taxation.

The chairman of the directors of each of the African subsidiaries was at all times P. Meinertzhagen. He had been (prior to 1948) an employee of Alfred Booth & Co. Ltd., in England, and went to Africa to form and supervise the African subsidiaries. He was not at any material time a director of Alfred Booth & Co. Ltd., he had no contract of service with any company in the group, and his remuneration took the form of a salary paid to him by Booth & Co. Ltd. (the other two African subsidiaries refunding Booth & Co. Ltd. part of it). He was described in the correspondence and in staff lists, as "Alfred Booth & Co. "Ltd., senior representative in East Africa."

The other directors of the African subsidiaries (who varied from time to time) were all persons employed by and holding contracts of service with the companies of which they became directors. Only one of them was a director of more than one of the African subsidiaries; this was one Trembath, who left in 1952, and was occasionally described or referred to as "Number "2" to Meinertzhagen. These directors were all elected to the boards of the African subsidiaries on the instructions of the parent company, Alfred Booth & Co. Ltd., and their contracts of service were made in London by Alfred Booth & Co. Ltd., as agent for the African subsidiary concerned. None of these directors was at any time a director of Alfred Booth & Co. Ltd. When occasion arose (as it did arise more than once) for removing one of them from office, the decision was taken in London by the directors of Alfred Booth & Co. Ltd., to determine his contract of service and remove him, and instructions to that effect were issued by Alfred Booth & Co. Ltd., to Meinertzhagen. When any question arose (as it did arise) of compensating a director or member of the staff of an African subsidiary for removal or dismissal, it was dealt with by the directors of Alfred Booth & Co. Ltd.; for this purpose they used Meinertzhagen as an intermediary, or as happened on one occasion, one of their number flew to East Africa to negotiate terms. The directors of the African subsidiaries did not all have access to all the documents of, or information concerning, the companies of which they were directors.

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The minute books of the directors' meetings of each of the African subsidiaries, recorded, in the main, only formal business (such as particulars of annual general meetings, appointments and retirements of directors, secretaries and accountants, resolutions concerning the operation of banking accounts or the affixing of the companies' seals to documents and the acquisition or transfer of mineral claims or other property) at meetings held on irregular dates; in a few instances they recorded more important business, but in each such instance a decision had in fact been taken by the directors of Alfred Booth & Co. Ltd. in London and the record in the minute book of the African subsidiary merely formally records its implementation. Meinertzhagen is recorded as present at each such meeting, with one or two other directors; in many cases, however, the directors recorded as being present had not actually met at all and might not have known that any meeting was supposed to be taking place, as directors as a rule were not notified of any meetings. All the minutes purporting to record meetings prior to 1952 were written up in 1952, to comply with law, on the instructions of the directors of Alfred Booth & Co. Ltd. They were written up from records that had been typed and kept loose in a book by previous company secretaries. In most cases, where the minute book records a meeting and business transacted thereat, the business recorded was in fact transacted by Meinertzhagen (in all matters of any importance, on the instructions of Alfred Booth & Co. Ltd.) and the minute was written afterwards. In no case did the directors of any of the African subsidiaries sit round a table as a board, and they never either took any decision as a board, met as a board, or were summoned to meet as a board.

At all material times the boards of directors of the African subsidiaries did not and for all practical purposes could not manage and control the businesses of their respective companies. If they had tried to manage and control their companies' businesses (otherwise than in accordance with instructions from the directors of Alfred Booth & Co. Ltd.) Alfred Booth & Co. Ltd. would have removed them from office.

At all material times the whole of the trading policy of the African subsidiaries was dictated by the board of directors of Alfred Booth & Co. Ltd. and was implemented by Meinertzhagen as their senior representative and chairman of the African subsidiaries. Meinertzhagen was, however, consulted on occasions before a decision was taken, and from time to time he made submissions to the parent board on behalf of the African subsidiaries which were taken into account in determining future policy. He made two visits to London in 1952 and 1953, having been summoned to attend discussions with the directors of Alfred Booth & Co. Ltd., on various aspects of the affairs of the African subsidiaries. There were also occasions when a visiting director of the parent company consulted the local directors on the spot before deciding what he wanted to do.

Article 145 of the Kenya Companies Ordinance provides that every company shall keep at its registered office a register of its directors or managers, and provides for the case of registration of a corporation as a director or manager. Subparagraph (6) thereof provides that " . . . a person in accordance with whose " directions or instructions the directors of a company are " accustomed to act shall be deemed to be a director and officer " of the company." At no time was the name of Alfred Booth & Co. Ltd. or of any director of that company included in the register of directors of any of the African subsidiaries.

At all material times every aspect of the businesses carried on by the African subsidiaries was under scrutiny by the executive directors of Alfred Booth & Co. Ltd. at their weekly meetings in London.

The commissioners found (as a conclusion of fact from a great deal of detailed evidence before them) that the aim of the directors of Alfred Booth & Co. was to have a single efficient executive arm in East Africa capable of exercising day-to-day management of all the East African undertakings, which could be relied on to implement their own policy decisions without the necessity of frequent visits to Africa by themselves. In 1952 and 1953, the day-to-day management of the undertakings was broadly supervised by Meinertzhagen, who was responsible for local (East African) management within the instructions and limitations (financial and otherwise) imposed upon him by the directors of Alfred Booth & Co. Ltd.; the work involved imposed too great a burden on him in view of the particular difficulties existing at that time and the fact that the undertakings were spread between Kampala and Mombasa. In particular, they were anxious to have a reliable " Number 2 " to him who could act during his absence.

The mining venture, which was in form one of the activities of Booth & Co. (Africa) Ltd., was in fact almost entirely managed from London. J. W. Booth authorised the purchase of a claim on a visit to Nairobi; after certain initial steps had been taken, it was financed entirely by Alfred Booth & Co. Ltd. without recourse to the African subsidiaries' bankers; the decision to start mining was taken by the executive directors in London; they sent out an expert to advise and report on the mine, and they decided what the rate of production should be, how much labour should be employed and what vehicles should be used. The manager of the mine made reports from time to time direct to them, without going through the channel of Booth & Co. (Africa) Ltd.

The agreement with Hollander Hyams Ltd., under which Booth & Co. Ltd. disposed of most of its hides, was negotiated in London between Hollander Hyams Ltd. and Alfred Booth & Co. Ltd., as agents for Booth & Co. Ltd. In the day-to-day working of the agreement, Hollander Hyams Ltd. normally dealt directly with Booth & Co. Ltd.

In 1952 and 1953 it was part of the policy of the board of directors of Alfred Booth & Co. Ltd. to sell any of the assets or

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undertakings of the African subsidiaries if opportunity offered, and they supervised negotiations (mainly carried out on their instructions by Meinertzhagen in Africa) for selling the tannery and, on another occasion, the mine. These negotiations proved abortive.

Throughout the material period the staff and officials of the African subsidiaries were making decisions concerning the day-to-day running of the trading activities of the African subsidiaries, within the general policy directions of Alfred Booth & Co. Ltd.

The United Kingdom subsidiaries of Alfred Booth & Co. Ltd. were managed by the parent company in the same way as the African subsidiaries. The company also had two subsidiaries in the United States of America which, however, were not subject to the same detailed control.

It was contended on behalf of Unit: (1) that each of the African subsidiaries was resident in the United Kingdom at all material times, within the meaning of section 20 (9) of the Finance Act, 1953; (2) that Unit was accordingly entitled to deduct the payments referred to above; and (3) that the assessments be reduced accordingly.

It was contended on behalf of the Crown: (1) that, as the African subsidiaries were admittedly resident in East Africa at all material times, they could not also at those times be resident in the United Kingdom; (2) that in any event none of the African subsidiaries was resident in the United Kingdom at any material time; and (3) that Unit was not entitled to the deductions claimed.

The commissioners who heard the appeal gave their decision as follows:

"We think, in addressing our minds to the question whether "the African subsidiaries were resident in the United Kingdom "in the material period, that the first question we have to "consider is what was the real situation regarding their manage-"ment and control.

"A number of (what have been described as) the acts of "interference in their management by the directors of Alfred "Booth & Co. Ltd. are equivocal, being equally well explained "as acts of parental or group control, or as the taking over of the "reins of management; others again are equivocal, being equally "well explained as the financial control of a creditor, or as the "taking over of the reins of management. . . .

"We find that the position was at the material times that the "boards of directors of the African subsidiaries (who are the "people one would have expected to find exercising control and "management) were standing aside in all matters of real import-"ance and in many matters of minor importance affecting the "central management and control, and we find that the real "control and management was being exercised by the board of "directors of Alfred Booth & Co. Ltd. in London.

"But it was contended on the part of the Crown that that

" finding would not be enough to conclude the question before us; " it was said that there must be something more, that is, that " before we could find that the African subsidiaries were resident " in the United Kingdom, we must find control exercised here " under the constitution of the company concerned, by those " officers to whom such constitution gives it; in other words, the " Crown contended that we must find some ' formal ' control and " management here. We have considered this contention very " carefully and have come to the conclusion that the authorities " cited to us do not constrain us to accept it nor do they point " very strongly to the conclusion that it is right. On the contrary, " we notice that Lord Loreburn L.C. in his judgment in *De Beers* " *Consolidated Mines Ltd.* v. *Howe* [3] directs attention to ' where " ' the central management and control actually abides,' and we " think it would be consistent with Lord Loreburn's reasoning to " stress the word ' actually.' In the course of the arguments " before us both sides relied on the remarks of Evershed M.R. in " *Union Corporation Ltd.* v. *Inland Revenue Commissioners*,[4] and " in particular on his reference to ' where the controlling power " ' and authority which, according to the ordinary constitution of " ' a limited liability company, is vested in its board of directors, " ' and the exercise of that power and authority, is to some sub- " ' stantial degree to be found.' [5] In the appeal before us, we find " the controlling power and authority, which according to the " constitution of each of the African subsidiaries is vested in its " board of directors, is actually exercised, to a very substantial " degree, by the board of Alfred Booth & Co. Ltd. in London. " We hold, on our understanding of the authorities, that once we " have found that as a fact, it is not necessary to go further and " inquire whether such power and authority is exercised under the " constitution of the company concerned by the officers to whom " such constitution gives it.

" For these reasons we find, and so far as it is a matter of law " we hold, that each of the African subsidiaries was resident in " the United Kingdom in 1952 and 1953. We do not think that we " are precluded from coming to this conclusion by reason of the " admitted fact that the African subsidiaries were at the material " times resident in East Africa, having regard to the judgment " of the Master of the Rolls in *Union Corporation Ltd.* v. *Inland* " *Revenue Commissioners*.[6] "

The points of law for the opinion of the court were: (1) whether there was evidence upon which the commissioners could arrive at their findings of fact; and (2) whether their conclusions were wrong in law.

Wynn-Parry J. reversed the decision of the commissioners and decided that the subsidiaries were not resident in the United

[3] [1906] A.C. 455; 5 T.C. 198.
[4] (1952) 34 T.C. 207, 271; [1952] 2 T.L.R. 651; [1952] W.N. 119; [1952] 1 All E.R. 646.
[5] 34 T.C. 207.
[6] Ibid.

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Kingdom within section 20 (9) of the Finance Act, 1953. Unit appealed.

Heyworth Talbot Q.C. and *J. Creese* for the taxpayer Unit Construction Co. Ltd.

Roy Borneman Q.C., *Alan S. Orr* and *J. R. Phillips* for the Crown.

In addition to the cases referred to in the judgments the following was cited in argument: *Kodak Ltd.* v. *Clark.*[7]

Cur. adv. vult.

February 12. JENKINS L.J. The judgment which is about to be read by Romer L.J. is the judgment of the court.

ROMER L.J. The question on this appeal is whether three wholly owned subsidiary companies of Alfred Booth & Co. Ltd., namely, Booth & Co. (Africa) Ltd., Booth & Co. Ltd. and Bulleys Tanneries Ltd. (hereinafter collectively referred to as "the sub-"sidiaries"), were, in 1952 and 1953, resident in the United Kingdom for the purposes of section 20 of the Finance Act, 1953. The special commissioners held that they were, but their decision was reversed by Wynn-Parry J. on the ground that it was wrong in law. The Unit Construction Co. Ltd., who are concerned to uphold the decision of the special commissioners, have appealed to this court against the judge's order.

It was admitted on behalf of the Unit Construction Co. Ltd. before the commissioners that the subsidiaries were at all material times resident in East Africa. We think it is quite clear that this submission was rightly made; and as every possible step was taken, when the subsidiaries were incorporated in 1948 and 1949, to ensure beyond possibility of doubt that their residence should be regarded as being in East Africa, and as their articles of association were never altered, it would have been virtually impossible for the Unit Construction Co. to have contended to the contrary. As the judge observed in his judgment[1]: "Not "only were all those companies registered in East Africa but they "carried on business there; the members of the respective boards "were resident there; and the articles of association provided in "each case that the board meetings and general meetings of the "company concerned could be held anywhere except in the "United Kingdom."

The fact that in 1952 and 1953 the subsidiaries were resident in East Africa is naturally somewhat embarrassing to the contention that in those years they were resident in the United Kingdom. It is not, however, in any way destructive of that contention because ever since the decision of the House of Lords

[7] [1903] 1 K.B. 505; 4 T.C. 549.

[1] [1958] 3 W.L.R. 504, 513; [1958] 3 All E.R. 186.

in *Swedish Central Railway Co. Ltd.* v. *Thompson*,[2] it has been well established that, for income tax purposes, a company can simultaneously have two "residences" in different countries. The view of the special commissioners that during the relevant period the subsidiaries could properly be regarded as resident in the United Kingdom as well as in East Africa was based upon their finding that each of these companies was controlled and managed by the parent company, Alfred Booth & Co. Ltd., which is incorporated and resident in England. "We find," the commissioners say in the stated case, "that the position was at the "material times that the boards of directors of the African sub-"sidiaries (who are the people one would have expected to find "exercising control and management) were standing aside in all "matters of real importance and in many matters of minor "importance affecting the central management and control, and "we find that the real control and management was being "exercised by the board of directors of Alfred Booth & Co. Ltd. "in London. . . . We find the controlling power and authority, "which according to the constitution of each of the African "subsidiaries is vested in its board of directors, is actually "exercised, to a very substantial degree, by the board of Alfred "Booth & Co. Ltd. in London." The reasons for these findings, and the facts on which they are based, are stated with great care and clarity in the case, and there is no doubt but that the findings are fully warranted. The only question before the judge, as it is before us, was whether those findings justified the commissioners' conclusion in law that the subsidiaries had a residence in the United Kingdom. Having found as a fact that the controlling power and authority over the subsidiaries was actually exercised by the parent company in London the commissioners held, on their understanding of the authorities, that "it is not "necessary to go further and inquire whether such power and "authority is exercised under the constitution of the company "concerned by the officers to whom such constitution gives it." It is upon that issue of law that the judge differed from the special commissioners, and it is that issue which has been brought to this court for decision.

The question, in its briefest form, may be illustrated and posed as follows: Company A, resident in one country, is de facto, but not de jure, managed and controlled by company B, which is resident in another. Is a dual residence to be attributed to company A by reason of this de facto management and control? The special commissioners in effect answered this question in the affirmative. The judge came to a different conclusion, and he expressed it in a judgment with which we so wholly agree that we would be content to adopt it as our own, both in its reasoning and in its language. Out of deference, however, to the arguments which were addressed to us by Mr. Heyworth Talbot and Mr.

[2] [1925] A.C. 495; 41 T.L.R. 385; 9 T.C. 342.

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Creese for the taxpayer, we will state as shortly as possible in our own words the reasons why, as it seems to us, the appeal must fail.

Mr. Talbot submitted in support of his case the following three propositions: 1. The powers of shareholders as such do not invest them with the central management and control of the company's business. 2. But where a company is a wholly owned subsidiary the powers of the parent company with regard to the dismissal of directors and the provision of finance upon which the conduct of the subsidiary's business may depend put the parent company in a position to assume and exercise de facto the management and control of the company's business. 3. Whether or not the parent company assumes an exercise de facto of the management and control of the subsidiary's business is a question of fact.

For our part we are prepared to accept each of these propositions as correct. The first of them is clearly established by the decision of the Court of Appeal in *Gramophone and Typewriter Ltd.* v. *Stanley*.[3] Wynn-Parry referred to this case in his judgment and cited extracts from the judgments of Sir Herbert Cozens-Hardy M.R. and of Buckley L.J. We need not repeat them, but would refer only to a few passages from the judgment of Fletcher-Moulton L.J., which are perhaps of equal interest and relevance.

"This legal proposition," said the Lord Justice,[4] "that the "legal corporator cannot be held to be wholly or partly carrying "on the business of the corporation is not weakened by the fact "that the extent of his interest in it entitles him to exercise "a greater or less amount of control over the manner in which "that business is carried on. Such control is inseparable from "his position as a corporator and is a wholly different thing both "in fact and in law from carrying on the business himself. The "directors and employees of the corporation are not his agents "and he has no power of giving directions to them which they "must obey . . . (The shareholders') course is to obtain the "requisite majority to remove the directors and put persons in "their place who agree to their policy. This shows that the "control of individual corporators is something wholly different "from the management of the business itself."

Fletcher-Moulton L.J. then proceeded to examine what he described as "a more difficult question," namely, the position which arises when one individual owns the whole of the shares in a corporation—which is permissible under German law, or was at all events permissible when *Stanley's* case [5] was recorded. He said [6]: "Treating it as an abstract proposition of law, I am "of opinion that the acquisition of the whole of the shares of a "corporation by one individual does not, of itself, alter the nature "of his relationship to the corporation. His de facto control

[3] [1908] 2 K.B. 89; sub nom. *Stanley* v. *The Gramophone and Typewriter Ltd.*, 5 T.C. 358.

[4] 5 T.C. 358, 376.

[5] Ibid. 358.

[6] Ibid. 377.

"when he possesses 98 per cent. is probably complete from a "practical point of view, and although it is, no doubt, rendered "more complete in theory when he possesses himself of the "whole of the shares, it is still of the nature of a control exer-"cised by corporators over the corporation, and does not make "him and the corporation in any sense identical. The directors "of the corporation do not become his agents. Their duties are "still controlled by the rules and constitution of the corporation "itself. Nor is this consideration one of theoretical law only. "The fact that the whole of the shares of the corporation are "held by one individual at one moment by no means implies that "they will be so at a future time; and the responsibility of the "directors and officers of the corporation is to the corporation "itself, whatever be its composition at any moment as to the "number of corporators. It would be no excuse to them, when "called to account in the regular way and at the regular periods "according to the constitution of the corporation, to plead that "they obeyed the directions of the corporators at a particular "moment (unless given in the manner prescribed by the consti-"tution of the corporation) and on the strength of such directions "failed to obey the corporate rules."

If, then, authority were required to establish Mr. Talbot's first proposition, one need go no further than *Stanley's* case [7] to find it. Mr. Talbot's third proposition is also correct; the question of de facto control, if it should be relevant in any case, must clearly be one of fact. Mr. Borneman, for the Crown, was inclined to dispute the validity of Mr. Talbot's second proposition on the ground that it was inconsistent with the judgments and decision in *Stanley's* case.[7] A study of those judgments shows, however, in our opinion, that there is no such inconsistency, for they recognise that a shareholder who holds sufficient shares in a company can de facto control its affairs by his ability to remove directors who disagree with his policy and to vote others into their places. The weakness of Mr. Talbot's second proposition, to our mind, is not that it is inconsistent with authority but that it is irrelevant to the issue which falls to be decided.

Mr. Talbot was certainly able to point to passages in the judgments of judges who decided previous cases as supporting, at first sight, the view that the place in which is to be found the actual management or control of the company's business determines the residence of the company.

We will quote a few examples. In *De Beers Consolidated Mines Ltd.* v. *Howe* [8] Lord Loreburn L.C. accepted and enunciated the principle that [9] "a company resides, for the purposes "of income tax, where its real business is carried on . . . and "the real business is carried on where the central management "and control actually abides." Mr. Talbot naturally laid stress on the use by Lord Loreburn of the word "actually."

[7] 5 T.C. 358.
[8] [1906] A.C. 455; 5 T.C. 198.
[9] [1906] A.C. 455, 458.

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In *American Thread Co.* v. *Joyce*[10] Hamilton J., after referring to Lord Loreburn's test in the *De Beers* case,[11] said[12]: "This test, 'the real business is carried on where the central "'management and control actually abides,' does not differ to "my mind in substance from the tests mentioned in earlier cases, "such as 'the conduct and management, the head and brain of "'the trading adventure' in the *San Paulo (Brazilian) Rail-"way Co.* v. *Carter*,[13] or the expression which has not been "uncommonly used by commissioners 'the head and seat and "'directing power of the affairs,' but owing to its being compact "and precise, it appears to me to be the convenient one for "adoption."

In the same case on appeal to the House of Lords Lord Halsbury said[14] that the real test "which, after all, is only a "question of analogy—you cannot talk about a company residing "anywhere—and that which has been accepted as a test, is "where what we should call the head office in popular language "is, and where the business of the company is really directed "and carried on in that sense." This exposition by Lord Halsbury of the test to be applied was referred to by Lord Sumner in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd*,[15] and he said[16]: "This expression of opinion can only mean that for "both British and foreign companies alike the test is where on "the facts (including among all the others the fact of incorpora-"tion here or there) the company's business is really directed "and carried on."

Relying on such judicial utterances as these, and there are others to the like effect, Mr. Talbot contends that on the findings of the commissioners it is clear that the central management and control of the subsidiaries actually abides in London and it is from there that their business is really directed and carried on. Mr. Borneman, however, met this contention and, in our opinion, successfully met it, in two ways. First, he said that the scope and significance of judgments can only be truly assessed in the light of the facts of the particular cases in which they are delivered. This, of course, is undeniably true. All the judgments to which we have referred, and on which Mr. Talbot relied, were delivered in what we might call ordinary cases and there is no reason at all to suppose that the judges had in mind such a case as the present in which de jure management is vested in one company whilst de facto control is vested in another. In none of the relevant authorities was so special a case referred to in argument or adverted to in the judgments. Judicial language is only authoritative in so far as it is directed to the particular subject-matter which is present to the speaker's mind; and,

[10] (1911–12) 6 T.C. 1; 28 T.L.R. 233.
[11] [1906] A.C. 455.
[12] 6 T.C. 1.
[13] [1895] 1 Q.B. 580; 3 T.C. 344.
[14] 6 T.C. 1, 165.
[15] [1929] A.C. 1; 44 T.L.R. 747; sub nom. *Todd* v. *The Egyptian Delta Land and Investment Co. Ltd.*, 14 T.C. 119.
[16] 14 T.C. 119, 151.

whatever its apparent width, it has no force, even persuasive, outside the limits of its intended application. Accordingly the passages from the various judgments and speeches to which we have referred and on which Mr. Talbot sought to rely do not, in our opinion, advance the taxpayer's case. The second point which Mr. Borneman took is, we think, equally well founded. He submitted that it is a legitimate assumption that, whatever judges may have said with regard to acts or other elements which may determine residence, such acts or elements were envisaged as being regular and not irregular, constitutionally lawful and not unlawful. We think this must prima facie be so and the relevance of the consideration arises very directly in relation to article 67 of Table A in the First Schedule to the Companies Ordinance of Kenya, 1933. This article, which was incorporated in the articles of association of each of the subsidiaries, provides (so far as material) that "the business of the company shall be "managed by the directors, who may . . . exercise all such "powers of the company as are not, by the ordinance, or by these "articles, required to be exercised by the company in general "meeting." If, submitted Mr. Borneman, and as the special commissioners have found, the business of the company was in fact being managed by the parent company and not by the subsidiaries' own directors, the provisions of article 67 were being wholly disregarded; and an act such as that, the flouting of a term of a subsidiary company's constitution, can never have been judicially contemplated as being a guide to the residence of that company. In other words, says Mr. Borneman, where the judges have referred to the place where the central management and control is to be found, they mean the constitutional management and control and nothing else. As we say, we accept that submission, and the result of accepting it is that, inasmuch as under the constitutions of the subsidiaries their management and control was vested in their directors in Kenya and in them alone, there is no warrant in the authorities for attributing to the subsidiaries a second residence in England by reason of the usurpation of the directing power by the parent company. The conclusion that only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company seemed to the judge, as it seems also to us, to be strongly borne out by the judgment of this court in *Union Corporation Ltd.* v. *Inland Revenue Commissioners.*[17] In the course of that judgment there appears the following passage, which Wynn-Parry J. cited[18]: "'The company may be properly found to reside in "'a country where it "really does business," that is to say "'where the controlling power and authority which, according "'to the ordinary constitution of a limited liability company, is "'vested in its board of directors, and the exercise of that

[17] (1952) 34 T.C. 207; [1952] W.N. 119; [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646.

[18] 34 T.C. 207, 271; [1958] 3 W.L.R. 504, 517.

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" ' power and authority, is to some substantial degree to be " ' found.' "

Evershed M.R., who read the judgment of the court, then referred to a passage from the judgment of Sir Owen Dixon in the Australian case of *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioners of Taxation.*[19] This passage is also cited by the judge, and so we will not repeat it. We will, however, refer to the judge's conclusion[20] on the matter, with which we respectfully and entirely agree: " In my view this passage is " conclusive of the question before me. In the first place, the " words of the Master of the Rolls, ' that is to say, where the " ' controlling power and authority which, according to the " ' ordinary constitution of a limited liability company is vested " ' in its board of directors, and the exercise of that power and " ' authority is to some substantial degree to be found,' indicate " to my mind that he was contemplating only an exercise of " authority which could properly be exercised within the frame- " work of the constitution of the company concerned. This " conclusion is, I think, inevitable when one considers the phrase " used by Dixon J., ' the superior or directing authority.' In " that context ' authority ' must have a narrower meaning than " ' power.' It must connote something which has been regularly " established, and because of that regular establishment is " entitled and able to exercise direction. To my mind, the board " of the parent company cannot fall within the phrase ' superior " ' or directing authority.' As such it has no authority over the " boards of the African subsidiaries. True those boards may " accept the instructions of the board of the parent company; but " they are not bound to do so. It may be that they do accept " instructions, because failure to do so would result in dismissal, " but acceptance in fact of such instructions does not mean that " the board of the parent company have authority to give the " instructions. As I have said, they have no such authority. It " must follow, to my mind, that in applying the test adumbrated " by the Master of the Rolls no weight or attention can be given " to the activities of the board of the parent company in relation " to Unit and the African subsidiaries for the purpose of con- " sidering whether or not any of them are resident in the United " Kingdom. In the result it cannot be said that any part of the " superior and directing authority of these companies can be said " to exist in the place claimed as a residence, namely, the United " Kingdom. Further, even if ' authority ' could be regarded as " being synonymous with ' power,' the word ' power ' in the " context would have to be read as ' power regularly exercised.' "

We should perhaps make a brief reference to two cases upon which Mr. Talbot and Mr. Creese respectively placed some reliance. The first was *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer.*[21] In that case a company formed a subsidiary

[19] (1940) 64 C.L.R. 15.
[20] [1958] 3 W.L.R. 504, 517.
[21] [1958] 3 W.L.R. 404; [1958] 3 All E.R. 66.

and caused its own nominees to be appointed on to the board of directors. These nominees exercised their powers in the interests of the parent company and to the detriment of the subsidiary to such an extent that the latter's business came virtually to a standstill. Some minority shareholders accordingly presented a petition under the Companies Act, 1948, section 210, for an order on the parent company to purchase their shares. The House of Lords held they were entitled to the relief sought and that, to quote from the headnote, the parent company "had acted "towards the minority shareholders of the (subsidiary) company "in an oppressive manner and that this conduct through the "nominee directors of the company, who were also directors of "the society, amounted to conduct of the affairs of the company, "since the transactions of the two could not be separated." We do not think that that case is of any assistance. It shows that de facto control of a company's business from outside can constitute an oppressive conduct of its affairs for the purposes of section 210, but that is far removed from showing that such control can affect the company's "residence." The second case was *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.*[22] In that case one of the questions in debate was, in substance, whether a company which was incorporated in England but whose shareholders (save one) and directors were Germans resident in Germany could sue in this country in time of war between the two countries. Lord Parker of Waddington, with the concurrence of other of the Law Lords, expressed the view that (to quote again from the headnote) "the character of "individual shareholders cannot of itself affect the character of the "company; but the enemy character of individual shareholders "and their conduct may be material on the question whether the "company's agents or the persons de facto in control of its affairs "are in fact adhering to, taking instructions from, or acting under "the control of enemies." We cannot ourselves see how that view, or any of the speeches of their Lordships in that case, have any bearing on the effect on the residence of a company of its business being carried on under extraneous control. The only matter which their Lordships were discussing was the extent to which the character of an English company (British on the one hand or enemy on the other) should be determined by the character of those who de facto controlled its affairs.

It only remains to say that for the reasons which we have explained, and which are in substance the same as those expressed in the judge's judgment, this appeal, in our opinion, fails and must be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Herbert Smith & Co.; Solicitor of Inland Revenue.*

E. D.

[22] [1916] 2 A.C. 307; 32 T.L.R. 624.

[CHANCERY DIVISION.]

1959
March 5, 6.

Vaisey and Harman JJ.

In re HASTINGS (NO. 3).

Habeas Corpus—Criminal cause or matter—Successive applications—Refusal of applications by Queen's Bench Divisional Court—Application renewed to Chancery Divisional Court—Based on same evidence and same grounds—Whether court entitled to entertain application—Applications to different judges of same Division—Habeas Corpus Act, 1679 (31 *Car.* 2, *c.* 2), *s.* 2—*Habeas Corpus Act,* 1816 (56 *Geo.* 3, *c.* 100), *ss.* 3, 6—*Supreme Court of Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 2, 46—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 1, 63.

High Court—Jurisdiction—Divisional Court—Jurisdiction of judge to reserve point for its consideration—Supreme Court of Judicature Act, 1873, *s.* 46.

High Court—Division—Judge of High Court—Assignment to particular Division—Divisions not separate courts.

An applicant for a writ of habeas corpus in a criminal cause or matter, who has once been heard by a Divisional Court of the Queen's Bench Division, cannot be heard again, on a renewed application made on the same evidence and the same grounds, by a Divisional Court of the Chancery Division, since the decision of a Divisional Court is equivalent to the decision of all the judges of the High Court.

Per Vaisey J. Since the Judicature Act, 1873, the Courts of the Queen's Bench Division and the Court of Chancery no longer exist as separate courts; there is one High Court to which all puisne judges are appointed and they are then assigned to do the business of a particular Division.

Per Harman J. An applicant has not and never has had a right to apply successively from judge to judge of the same Division other than during the vacation.

In re Hastings (No. 2) [1958] 3 W.L.R. 768; [1958] 3 All E.R. 625 applied.

Application for a writ of habeas corpus.

On July 25, 1957, the applicant, Edward Thomas Hastings, was convicted at Liverpool Crown Court on each count of an indictment containing five counts to which he had pleaded Not Guilty. The first count charged him with felony, larceny as a bailee, while the other counts were for misdemeanours, counts two, three and four charging false pretences and count five fraudulent conversion. Separate verdicts were returned in respect of each count.

The recorder, passing sentence, said: "Edward Thomas "Hastings, you have been convicted on the plainest evidence "of deliberate, calculated and systematic frauds. Those frauds "have not only affected companies well able to sustain loss but "have cruelly brought grave financial burdens on little men which "it will be difficult for them to bear. This is by no means "the first time you have been convicted of dishonesty. You "are a menace to the integrity and health of the commercial

"community. You will go to prison for four years' corrective "training."

The recorder did not say "concurrent on each count" and the sentence endorsed on the indictment was merely "four years' "corrective training." That was also the sentence entered on the calendar for the session of the court and on the warrant of commitment sent to the Governor of Walton Prison where the applicant was detained.

The applicant was given leave to appeal against conviction to the Court of Criminal Appeal in respect of the first and two other counts. On December 18, 1957, his appeal was heard and in the result the count for felony was quashed, the appeal in relation to the two other counts being dismissed. There was no alteration in the sentence. Pearson J., who gave the judgment of the court, stated expressly that, although leave to appeal against sentence had not been asked for, the sentence was in the view of the court reasonable and there would be no reason for interfering with it on any view.

The applicant applied for a writ of habeas corpus directed to the Governor of Walton Prison and to the Home Secretary on the ground, inter alia, that only one general sentence had been passed on him and that, since the conviction on the first count had been quashed, there was no lawful sentence upon him in existence and he was not lawfully detained.

The application was heard by a Divisional Court consisting of Lord Goddard C.J., Streatfeild and Slade JJ. on March 7, 1958,[1] but the writ was refused, the court holding that, as a matter of construction, the words used by the recorder amounted to concurrent sentences of four years' corrective training on each count and that accordingly the quashing of one count had no effect on the sentence, which remained a valid sentence. The applicant appealed from that decision to the Court of Appeal who refused to entertain the appeal on the ground that it arose in a criminal cause or matter in which they had no jurisdiction.[2]

On October 24, 1958, the applicant made a fresh application for the writ (on this occasion directed to the Governor of H.M. Prison, Wandsworth, where he was then detained) to a Divisional Court of the Queen's Bench Division consisting of three different judges, it being contended that he had the right to go from judge to judge and from one Divisional Court of three judges to another Divisional Court of three different judges; the fresh application was made on exactly the same grounds and on the same evidence as in the previous application. The court, being of opinion that there was an arguable point, gave leave to move subject to their being satisfied that they had jurisdiction to hear and were bound to hear a fresh application.

At the hearing of that application on November 4, 1958,[3] the

[1] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.

[2] The Times, July 29, 1958.

[3] [1958] 3 W.L.R. 768; [1958] 3 All E.R. 625.

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court, acceding to an objection by the Solicitor-General, held that it had no jurisdiction to hear an application which, on the same evidence and on the same grounds, had already been decided by the Divisional Court.

The applicant now applied to a Divisional Court of the Chancery Division convened by Vaisey J. at the request of the Lord Chancellor.

Neil Butter for the applicant.

Sir Harry Hylton-Foster Q.C., S.-G., and *Rodger Winn* for the Crown.

The following cases were cited in argument, in addition to those referred to in the judgments: *Ex parte Partington* [4]; *Cox* v. *Hakes* [5]; *In re Cobbett* [6]; *In re Carroll* [7]; *Rex* v. *Governor of Brixton Prison, Ex parte Savartar* [8]; *Jacobs* v. *Brett* [9]; *R.* v. *Secretary of State for Home Affairs, Ex parte Greene* [10]; *Ex parte Chapple.* [11]

The Solicitor-General took a preliminary objection that the court, as constituted, was not a Divisional Court of the Chancery Division, such courts being the creation of statute alone to hear the application; but he suggested that if, pursuant to section 46 of the Judicature Act, 1873 [12] (a section which remained unrepealed), one member of the court were to withdraw, the remaining member of the court sitting "elsewhere than in a Divisional Court "might reserve the point for the consideration of a Divisional "Court. . . ." Harman J. accordingly withdrew, and the application was then made to Vaisey J., who reserved the point as a proper one to be referred to a Divisional Court. Harman J. returned and the hearing proceeded before the Divisional Court thus set up. The Solicitor-General took the same objection as that taken before the Divisional Court of the Queen's Bench Division and secondly that mentioned above.

Vaisey J. In our judgment, the preliminary point taken by the Solicitor-General is well founded and should succeed. I will endeavour, in a few sentences, to explain my own reasons for having come to that conclusion.

[His Lordship stated the facts and continued:] In the second

[4] (1845) 13 M. & W. 679; 9 Jur. 92.

[5] (1890) 15 App.Cas. 506; 6 T.L.R. 465.

[6] (1845) 5 L.T.O.S. 130.

[7] [1931] 1 K.B. 104.

[8] [1910] 2 K.B. 1056; 26 T.L.R. 561.

[9] (1875) L.R.Eq. 1.

[10] [1942] 1 K.B. 87; [1941] 3 All E.R. 104.

[11] (1950) 66 T.L.R. (Pt. 2) 932.

[12] Supreme Court of Judicature Act, 1873, s. 46: "Subject to any "rules of court, any judge of the High "Court, sitting in the exercise of its "jurisdiction elsewhere than in a "Divisional Court, may reserve any "case, or any point in a case, for the "consideration of a Divisional "Court. . . ."

application [1] for a writ of habeas corpus, the earlier application to a Queen's Bench Divisional Court presided over by Lord Goddard having been refused,[2] Lord Parker C.J. considered the position as it had been in the past and was in the present. He pointed out that the old practice by which the applicant for a writ of habeas corpus could go from court to court until he got satisfaction quite obviously had been abrogated by the fact that since the year 1873 there had only been one court, so that there could be no question of going from court to court. [Section 3 of the Supreme Court of Judicature Act, 1873, now section 1 of the Supreme Court of Judicature (Consolidation) Act, 1925.]

There then came the further question, which Lord Parker C.J. considered, as to whether in fact the practice of going from judge to judge still subsisted, and there is no doubt that a certain amount of judicial authority would seem to point to the fact that that is still an existing right. Lord Parker C.J. thought that it was not, and he explained the ancient practice by the necessity of finding someone to deal with a case during vacations. In those days a far greater part of the year was taken up by law vacations than it is at present, and when the courts were not sitting in banc if relief was wanted, it was necessary to apply to a judge, because that was the only way of ascertaining the will of the judicature. But Lord Parker thought that, having regard to modern conditions, that right had been practically abrogated.

When it is remembered that by R.S.C., Ord. 59, r. 1, the rule now is that an application for a writ of habeas corpus must be made to a Divisional Court, it is a little hard to see, if there is a right to go from judge to judge, what any judge would do when application was made to him. One would think that all that he could do properly would be to refer the matter to a Divisional Court, so that the position would be exactly the same as if there had been no such right of going from judge to judge.

Lord Parker, in his judgment, came to this final conclusion. He said [3]: "The applicant, having already once been heard by a "Divisional Court of the Queen's Bench Division"—that being, of course, the previous hearing before Lord Goddard and two judges—"is not entitled to be heard again by another Divisional "Court of the same Division."

It would have been perfectly possible, and I think logical, if Lord Parker had said: "He is not entitled to be heard again by "any tribunal carved out of the one single tribunal of the High "Court." But Lord Parker was doubtless confining himself to the point strictly in issue. In as much as the Rules of the Supreme Court say such applications must go to a Divisional Court of the Queen's Bench Division, I think that the sentence which I have just read from the judgment of Lord Parker means

[1] [1958] 1 W.L.R. 372; [1958] 1 All E.R. 707.

[2] [1958] 3 W.L.R. 768.

[3] Ibid. 768, 781.

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that really there had been an end of the matter when the application was before the court presided over by Lord Goddard, and that Lord Parker thought that that was the end of the case.

The applicant was very anxious to apply to the Chancery Division, but I think that his application is based upon a complete misconception. The mistake the applicant or his advisers made was to assume that the Chancery Division is a separate entity, a separate court, and that either by single judges or by a Divisional Court it can deal with the matter afresh.

The applicant used an expression which he must suppose to be flattering to us who are sitting here. He said in his affidavit that he had decided to come for a "*complete* hearing before a "hitherto unconnected and impartial bench, and this I seek in the "Chancery Court." The number of misconceptions which are bound up in that sentence is almost beyond reckoning. To begin with, while I hope it is an impartial bench, it is certainly not an independent bench. Indeed, as Lord Parker has ruled with, I think, perfect accuracy, as soon as the Divisional Court of the Queen's Bench Division has come to its conclusion there is an end of the matter, and, as I observed yesterday, it always has to be remembered that our orders are not orders of any particular Division or any particular Divisional Court; our orders are orders of the High Court. How we, judges of the High Court, could be heard to override, overrule, or otherwise interfere with a judgment which was the result of the hearing by the Divisional Court, or how we could be heard to say that the conclusion of that court, and its order—an order of our own court, the only court which exists, the High Court of Justice—was wrong, and that something else should be done, is beyond my comprehension.

When the Queen's Bench Divisional Court, acting strictly under the rules, came to its conclusion that finally disposed of the application of this applicant for the issue of a writ of habeas corpus, I cannot see how this court, or how we, as judges, could possibly be heard to stultify a decision of the court of which we are ourselves constituent parts: we are all of us judges of the High Court. I cannot see how we could be heard to contradict an order which has been made for us in our name, and by the only court which has jurisdiction in this matter.

It is a curious thing, and I think very notable and encountered in many connections, how hardly this idea of the separate courts dies. The Habeas Corpus Act was passed in the reign of Charles II, and all remember how that monarch with his graceful courtesy apologised to those who surrounded his deathbed for being an unconscionable time a-dying. I think that an "unconscionable time a-dying" may certainly be said of those courts which we thought had been put an end to and were dead and buried in 1873, and yet continually emerge in the minds and in the speech of English people as if they still exist. The expression "The Court of Chancery" is constantly heard, yet it is three generations since it existed as a court. "The Court of

"Queen's Bench" is referred to in the same way: But there is now only one court—the High Court of Justice. Of course there is nothing wrong with those expressions provided that it is remembered that the orders which we make, sitting as judges to hear either Chancery or Queen's Bench cases, are orders of the one High Court, not of ourselves or of our own particular branch, or part or Division, or emanation of it, so to speak, and that we all act in, as, and on behalf of the one High Court of Justice.

It is said sometimes that there are people abroad who do not always realise that we are not at the moment living under the conditions described in Charles Dickens' novels. I have no doubt that more is known about wards of court from the pages of Bleak House than can be discovered in textbooks or historical books of reference, and I do not forget that there may be others in this court who remember that Tony Weller, the father of Sam Weller, knew enough Latin at any rate to think that habeas corpus was sufficiently well translated by the words "have his carcase." Although these things were known and discussed a hundred years ago, I do not think that people have got very far in knowing the reforms which have been effected, and a good deal of colour is lent to the suggestion of separate courts by various expressions which are used, "a "Chancery judge," "a Queen's Bench judge," which mean, respectively, a judge assigned to do the work which is commonly denominated Chancery work, and a judge assigned to do that work which was commonly done in the old court of Queen's Bench. Section 2 of the Supreme Court of Judicature (Consolidation) Act, 1925, obliges us to be appointed under the description of "judges of the High Court," and although my own belief is that that statutory requirement has not always been complied with, still in the times to which I can speak—the last 15 years—every judge has been appointed without any kind of qualification, "a judge of the High Court." That has to be remembered. If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion.

It may take some time for that to become known, if indeed people are interested in knowing it. But the main fact that I wish to emphasise in this case is that there is but one High Court. ("The Supreme Court" is an expression with a different meaning.) There is one High Court to which all Her Majesty's "Puisne Judges," as they are called, belong, and by whose decisions we are bound. Although it is perfectly proper that I or Harman J. should criticise, or indeed on occasions depart from a decision, speaking colloquially, of the Queen's Bench Division, it is quite possible for us in some other case to refuse to use it as a precedent. It is impossible for us to interfere with an order made in a particular case.

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In this case, for instance, the court has already come to a decision, and how can we interfere? It is quite impossible to envisage any such position arising. I do not think that we have jurisdiction to hear this application and I am in favour of dismissing it.

Harman J. I concur in the conclusion at which my brother has arrived. It is always sad to be stripped of an illusion, but I, like, I expect, most lawyers, have grown up in the belief that in cases of habeas corpus the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional Court last year in this very case. The decision was based upon this, that there never had been such a right. There had been a right to go from court to court; there had been a right in vacation to go from judge to judge, for the simple reason that the court was not sitting in banc; but there had never been a right in term time to go from one judge to another when the court to which the application should properly be made was available.

Mr. Butter, for whose argument I, for one, am much indebted, said that the clou of his case was this, that there still was this right to go from judge to judge, and that if that were not so the whole structure would come to the ground. He naturally relied very strongly upon the decision of the Privy Council in *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*,[4] and no doubt if Lord Hailsham's observations there are justified there is much to be said for the existence of the right. But I must confess that my belief in that judgment was very much shaken by the Irish case of *The State* (*Dowling*) v. *Kingston* (*No. 2*),[5] and the very cogent judgment of FitzGibbon J. in it, referred to by Lord Parker C.J.

The judgment of the Queen's Bench Divisional Court made good that this supposed right was an illusion. If that be right the rest follows. Nobody doubts that there was a right to go from court to court, as Vaisey J. has already explained. But there are no different courts now to go to. The courts that used to sit in banc have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by R.S.C., Ord. 54, r. 1, to Divisional Courts of the Queen's Bench Division, and that is the only place to which a suppliant may go. He will, in the first instance, it is said, have a right to go to one judge, but the only result of that, except in a case of most extreme urgency, would be that the judge would appoint him to go on to the proper tribunal, namely, the Divisional Court.

Even if there were this right now existing to go from one judge to another it would not, in practice, be any bulwark of the liberty

[4] [1928] A.C. 459; 44 T.L.R. 632. [5] [1937] Ir.R. 699.

of the subject, for the only result of doing so would be that the applicant would find himself before the Divisional Court.

Lord Parker and his colleagues were very careful not to go further than the court, so to call it, of Queen's Bench. It may be that they wished to refrain from treading on Chancery toes. And so the applicant was encouraged, it may be by the very limitation of the language, to present himself before this tribunal. But, as Vaisey J. has already observed, the judgments pronounced in the Queen's Bench Divisional Court apply to the whole High Court of Justice, and it was only diffidence that prevented our brethren of the Queen's Bench from saying so.

In my judgment, this application therefore is precluded, by the absence of the ancient but imaginary right, to go round and round and round from judge to judge when the term is in progress. There never was such a thing; there is not now; and this applicant, having had the judgment of the High Court, cannot have another one.

I concur respectfully in what Lord Parker C.J. says at the end of his judgment, namely, that it seems a pity that, this being a criminal case, there is no appeal. It would seem it would be a good step, as Lord Goddard C.J. was frequently heard to observe, if there was some means of taking a case like this to the House of Lords in order that the subject should not feel that he had a grievance. But that is a matter not within our province. All we can do is to dismiss the application.

Application dismissed.

Solicitors: *Official Solicitor; Treasury Solicitor.*

I. G. R. M.

[CHANCERY DIVISION.]

In re EMERY'S INVESTMENTS TRUSTS. EMERY *v.* EMERY.

[1957 E. 467.]

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Feb. 25, 26, 27.
Wynn-Parry J.

Equity—Clean hands—Presumption of advancement—Transaction in contravention of foreign revenue law—Foreign securities registered abroad in wife's name—Registration to avoid husband's tax liability in breach of foreign law—Intention that beneficial interest be held equally by husband and wife—Claim by husband to beneficial half interest in securities—Whether husband entitled to set up purpose of registration to rebut presumption of advancement.

Presumption (Rebuttable)—Advancement—Husband and wife—Foreign securities registered in wife's name—Intention that beneficial interest be held equally by husband and wife—Registration in wife's name

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to avoid husband's liability to foreign tax—Whether presumption rebutted.

Conflict of Laws—Revenue laws—Transaction in contravention of foreign tax law—Whether object may be set up to rebut presumption of advancement.

The plaintiff was a British subject married to an American citizen with whom at all material times he lived in South America, where he was employed and accordingly entitled to hold American dollars. American Savings Bonds purchased with the husband's money were registered in the name of the wife (the husband as an alien being unable to hold these bonds) with the husband expressly named as a beneficiary with her. Later the husband changed the bonds for common stock in American securities, which were also registered in the name of the wife; the intention of the husband was that the beneficial interest in the securities should be as to one-half to the wife and the other half to him; but, in order to avoid payment of American withholding tax, to which as an alien he was liable under American Federal law, no mention was made of his beneficial interest.

Subsequently the wife removed the securities and sold them. On a claim by the husband for a declaration that at the date of removal of the securities the wife held them as to one-half for him, alternatively, for the return of half of the proceeds of sale as money had and received by the wife to his use:—

Held, (1) that the registration of the securities in the wife's name raised a presumption of advancement which could not be rebutted on the ground that the purpose of the registration in her name only was to enable the husband to avoid payment of American Federal tax, for equity would not grant relief in respect of a transaction carried out in contravention of law, albeit a foreign revenue law.

Gascoigne v. *Gascoigne* [1918] 1 K.B. 223; 34 T.L.R. 168 and dicta of Denning L.J. in *Regazzoni* v. *K. C. Sethia (1944) Ltd.* [1956] 2 Q.B. 490; [1956] 2 W.L.R. 204; [1956] 2 All E.R. 487 applied.

(2) That once the equitable presumption of advancement arose there was no room for the common law claim based on money had and received to the use of the husband. The husband, accordingly, was not entitled to claim any share in the securities.

Action.

The plaintiff, Ralph Emery, a British subject, claimed a declaration that securities standing on November 30, 1955, in the name of the defendant, his wife, Helen Emery, an American citizen, were as to one-half of their value held by her in trust for him, alternatively the return of one-half of the proceeds of their sale as money had and received by the defendant to his use.

The following statement of facts is taken from the judgment: The parties were married in 1935. At all material times since 1929 the husband had been employed by one or more companies in the Shell group, and over the material period had fulfilled a succession of tours of duty in the South American Continent and Mexico. During that period, as he was resident in a "hard "currency area," he was entitled to hold dollars, and in September, 1945, he opened a joint account in the names of himself and his wife in New York with a branch of the Irving Trust Company.

That account, throughout its existence, was fed by money belonging to the husband. The wife was entitled to draw upon it equally with her husband, which was his way of providing for her needs.

Towards the end of 1947 the husband decided to invest a certain amount from the joint account every month in United States Savings Bonds Series E. Those bonds were not unlike the British National Savings Certificates—namely, over the years they increased in value, but no interest was payable. In pursuance of this intention, the plaintiff, by a letter dated November 14, 1947, wrote to the Irving Trust Company authorising them to invest 75 dollars per month in these savings bonds and to deduct the purchase price from the joint account. The letter ended: "The "co-owner will be my wife, Helen B. Emery." From the outset of this phase of the financial transactions the bonds were to be held for the joint benefit of the husband and wife.

It was not in fact permissible to issue these United States Savings Bonds to a non-resident alien of the United States, which was the plaintiff's status as regards the United States; and the bonds which had been issued were cancelled. Further bonds were issued in the name of the wife, with the husband expressly named as the beneficiary with her. No difficulty arose in that respect, and Wynn-Parry J. was satisfied on the evidence that it was within the relevant Federal law, which was the law applicable.

Until October, 1953, bonds were regularly acquired, as regards all of which the wife was trustee, and she and the husband were the beneficiaries in equal shares. In October, 1953, a material change occurred, when the husband was advised that he would do better from the financial point of view to invest any moneys available in common stock of first-class American companies, rather than to continue to do so in the National Bonds. In order to carry out that intention a letter was written by the husband to the Irving Trust Company on October 14, 1953; the material part of that letter was: "Secondly, my wife and I have decided "to withdraw the holdings of U.S. Government Series 'E' bonds "which you hold in her name. Would you kindly arrange to "redeem these, and invest the proceeds in Shell Oil Company "stock in Mrs. Emery's name; we should like to buy 100 shares "in Shell, and the difference would be made up by charging it "to our checking account [The joint account]." That was done, and the shares were taken up in the wife's name. In February, 1954, a purchase was made of New York shares of the Royal Dutch Petroleum Company; in February, 1955, 100 shares of the common stock of the Curtiss Wright Corporation were purchased, and registered in the wife's name; and, finally, in February, 1955, 20 shares of common stock of General Motors Corporation were purchased, and registered in the name of the wife.

The shares were thus left in the name of the wife and dividends

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were paid into the joint account, the trust company merely holding the certificates. In July, 1955, however, as a result of a talk between the manager of the Trust Company in New York on the one hand, and the husband on the other, the husband was informed that the trust company would like to regularise the position by opening a custody account in the name of the wife. In connection with their custody account, the Irving Trust Company had a particular form which was a full and detailed document.

It was addressed to the trust company by the wife, in whose name it was intended to open the custody account and was dated July 4, 1955. It stated: "Gentlemen: You are hereby authorised "and requested to open a custody account in the name(s) of the "undersigned [the wife] and, as custodian, to hold any securities "or other property deposited with you for such account for, and "subject at all times to the instructions of, the undersigned and "subject to the terms and conditions set forth below . . . " and there was authority to exchange securities in temporary form for securities in definitive form, and other authorities.

In the third clause it was stated: "You are authorised to "execute as agents in the name of the undersigned all declara-"tions, affidavits and certificates of ownership now or hereafter "required in collecting income and principal payments, inserting "thereon the name(s) of the undersigned as the owner(s) of the "securities, without indicating thereon that the undersigned's net "income does not exceed the undersigned's personal exemption "and other credits for Federal income tax purposes. In the event "the status of the undersigned is such that withholding of tax "from such income is required, you are authorised to withhold the "required amounts." Then the status of the undersigned was set out as being: "Citizen of U.S.A. with legal residence in "Brazil." At the end of the document, below the signature of the wife, was a paragraph headed: "Supplementary instructions "for joint account with right of survivorship." That was not treated as relevant, but there followed a delegation of authority which amounted to a power of attorney, and the wife appointed the husband as her attorney with full power of "transfer, sale, "exchange, or other disposition of any or all of the securities . . . "including income and proceeds, at any time held by you for "account of the undersigned . . . "

That document on the face of it held out the wife as being solely interested in the securities and the income therefrom. Wynn-Parry J. found as a fact that the husband was clearly a party to it, in the sense that he had it sent to him, that he read it and that he procured his wife to execute it and to appoint him as her attorney.

In 1955, the wife, having been asked for a divorce by her husband, consulted a solicitor in New York on whose advice on November 30, 1955, she removed all the securities from the Irving Trust Co., as she was entitled to do under terms of the document relating to the custody account. Later she sold the securities.

The husband did not discover that the securities had been withdrawn from the trust company until February, 1956, when, acting under the power of attorney, he requested the bank to hand them over to him. Their reply was that they were unable to comply with his request because the wife had already withdrawn the securities.

The marriage came to an end in 1956, and the parties came to England separately. There had been matrimonial proceedings which were not here relevant.

E. A. Morrison for the husband.
H. E. Francis for the wife.

The following cases in addition to those referred to in the judgment were cited in argument: *Dunbar* v. *Dunbar* [1]; *Shephard* v. *Cartwright* [2]; *Standing* v. *Bowring* [3]; *Middleton* v. *Pollock* [4]; *Mews* v. *Mews* [5]; *Warren* v. *Gurney* [6]; *Hoyes* v. *Kindersley* [7]; *Harrods Ltd.* v. *Tester* [8]; *Harvey* v. *Harvey* [9]; *Grey* v. *Grey* [10]; *Regazzoni* v. *K. C. Sethia (1944) Ltd.* [11]

WYNN-PARRY J. stated the facts as set out above and continued: The husband now seeks to recover from his wife one-half of the property which represents the securities in question. The question which I have to decide is whether or not the husband is entitled to any relevant relief.

I must consider again the end of the first phase, during which there can be no doubt but that the bonds were held in the name of the wife as trustee for the husband and the wife in equal shares so far as the beneficial interest was concerned. But immediately the first investment of the shares in the Shell Oil Company was made and registered in the wife's name, there being no longer any reference whatsoever to the beneficial interest of the husband, the equitable presumption of advancement arose, and it became necessary to answer the question: why were the shares put into the name of the wife?

There are two relevant intentions to be considered in this matter, and it is essential to recognise that circumstance and to distinguish between them. I find as a fact that the intention of the husband throughout was that the beneficial interest in all the shares should be as to half to the wife and as to the other half to him. I do not find, in effect, that he intended the beneficial interest in the whole to be his wife's.

But that is not enough to carry the husband to success, because I still have to consider the question why, contrary to what

[1] [1909] 2 Ch. 639.
[2] [1955] A.C. 431; [1954] 3 W.L.R. 967; [1954] 3 All E.R. 649.
[3] (1885) 31 Ch.D. 282; 2 T.L.R. 202.
[4] (1876) 2 Ch.D. 104.
[5] (1852) 15 Beav. 529.
[6] [1944] 2 All E.R. 472.
[7] (1854) 2 Sm. & Giff. 195.
[8] [1937] 2 All E.R. 236.
[9] (1686) 2 Ca. in Ch. 180.
[10] (1677) 2 Swans. 594.
[11] [1958] A.C. 301; [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286.

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was done before, the shares were not merely registered in the wife's name, and why there was a complete omission of any reference to his having a beneficial interest. The evidence disclosed that, under the Federal law of the United States, where dividends are payable to a non-resident alien the recipient is liable to a withholding tax which it is the duty either of the company declaring the dividend, or a body in the position of the Irving Trust Company receiving the dividends from the company, to deduct. Also I am satisfied from the evidence that the husband was well aware of that provision of the United States taxation law. That is plain from the documents alone, because in a letter of February 14, 1955, the husband wrote: "With "reference to my cable of February 2 in which I requested you "to purchase for my account 100 shares of Curtiss Wright "Common Stock, I acknowledge receipt of your advices to the "effect that this purchase was carried out at a price of 19.7/8ths. "I omitted to include in my request that this stock should be "registered in the name of my wife, Mrs. Helen B. Emery, who "is a U.S. citizen and therefore not subject to the withholding "tax. Would you kindly see that the registration is made in her "name."

That the husband knew about the withholding tax is also clear from a letter dated July 30, 1954, addressed to his wife, in which it was stated: " . . . While reviewing the stock records of Shell Oil "Company, we noticed that instead of withholding 30 per cent. "tax from your June 25 dividend, we withheld only 15 per cent. "resulting in our overpaying you $15.00. We regret any incon-"venience caused you but would appreciate your sending us that "amount with the enclosed copy of this letter." The matter was adjusted, however, as shown from a letter of August 10, 1954, on the trust company being satisfied that the wife was a citizen of the United States.

I am unable to proceed except upon the view that the husband knew that there was this withholding tax and that he, as a non-resident alien, was liable to suffer deduction of tax in respect of his beneficial interest in the securities. Indeed the husband in paragraph 3 of his statement of claim put this tax position in the forefront of his case, because the pleader says: "By reason of "the fact that the defendant, being an American citizen, is not "liable to pay to the American Government a withholding tax of "30 per cent. on the value of dividends earned in the United "States which by an American Federal Statute is chargeable to "non-resident aliens of that country and for no other reason on "the plaintiff's instructions and with the concurrence of the "defendant each and all of the said shares on purchase were "placed in the defendant's name to be held by her for the joint "benefit of the plaintiff and of the defendant."

In the circumstances which I have detailed, it is clear that, had the tax involved been United Kingdom income tax, this case

would have been covered by *Gascoigne* v. *Gascoigne*,[1] and would have been concluded against the plaintiff. The headnote in that case is as follows: "A husband took a lease of land in his wife's "name and built a house upon it with his own money. He used "his wife's name in the transaction with her knowledge and "connivance because he was in debt and was desirous of protect-"ing the property from his creditors. In an action by him "against his wife for a declaration that she held the property as "trustee for him:—*Held*, that he could not be allowed to set up "his own fraudulent design as rebutting the presumption that the "conveyance was intended as a gift to her, and that she was "entitled to retain the property for her own use notwithstanding "that she was a party to the fraud." Lush J.,[2] giving the judgment of the Divisional Court, said: "His"—that is, the county court judge's—"findings of fact must be taken to mean that the "plaintiff, with his wife's knowledge and connivance, concocted "the scheme of putting his property in her name, while retaining "the beneficial interest, for the purpose of misleading, defeating "and delaying present or future creditors. This was the whole "basis of the plaintiff's case, and it could not be put in any other "way consistently with his claim to be the owner of the property. "It was the reason he himself gave for his conduct. Now, "assuming that there was evidence to support the finding that "the defendant was a party to the scheme which the plaintiff "admitted, but without deciding it, what the learned judge has "done is this: He has permitted the plaintiff to rebut the "presumption which the law raises by setting up his own "illegality and fraud, and to obtain relief in equity because he has "succeeded in proving it. The plaintiff cannot do this; and, "whether the point was taken or not in the county court this "court cannot allow a judgment to stand which has given relief "under such circumstances as that."

In the analysis it will be found that there were two relevant intentions in *Gascoigne* v. *Gascoigne*.[3] The first was the intention of the husband that the house and land should, so far as the beneficial interest was concerned, be and remain his. The second intention was that he put the land and house into his wife's name with a view to protecting it from his creditors in case he should get into financial difficulties. In this case the first intention, corresponding to that in *Gascoigne* v. *Gascoigne*,[3] is the intention that the husband had throughout that the beneficial interest in the securities should be shared between himself and his wife. The second intention, which corresponds with the second intention in *Gascoigne* v. *Gascoigne*,[3] is the intention which the husband had in putting the securities in his own name, without any reference being made to the intention by him of any beneficial interest,

[1] [1918] 1 K.B. 223; 34 T.L.R. 168.

[2] [1918] 1 K.B. 223, 226.

[3] [1918] 1 K.B. 223; 34 T.L.R. 168.

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Wynn-Parry J.

namely, to avoid payment of withholding tax on his beneficial interest.

As I take that view I do not propose to traverse the evidence in any detail. It is enough to say that the wife, who was clearly a witness of the truth, was not able to help me very much. The husband, on the other hand, satisfied me by his evidence that his intention was that the beneficial interest should be shared, and there are various indications to support that, such as the retention of control and the payment of the dividends into the joint account. But matters such as the retention of control and the payment into the joint account cannot be decisive when once the equitable presumption of advancement has arisen, and it is necessary for the husband, in his endeavour to rebut that presumption, to assert that the property in question was put into his wife's name in order to avoid the payment on his beneficial interest of tax which would otherwise have been payable, so that, upon the basis that the tax had been United Kingdom tax, it appears to me that *Gascoigne* v. *Gascoigne*[4] completely covers the present case.

I, of course, am dealing here not with United Kingdom income tax, but with the Federal tax of the United States of America. There is, however, authority of the Court of Appeal which binds me in *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[5] I need refer only to a passage in the judgment of Denning L.J., who said[6]: "It is "perfectly true that the courts of this country will not enforce "the revenue laws or the criminal laws of another country at the "suit of that other country, either directly or indirectly. These "courts do not sit to collect taxes for another country or to inflict "punishments for it; and this is so even between countries of "the Commonwealth, as the House of Lords held in the *Govern-"ment of India* v. *Taylor*.[7] These courts will not enforce such "laws at the instance of the foreign country. It is quite another "matter to say that we will take no notice of them. It seems "to me that we should take notice of the laws of a friendly "country, even if they are revenue laws or penal laws or political "laws, however they may be described, at least, to this extent, "that if two people knowingly agree together to break the laws "of a friendly country or to procure someone else to break them "or to assist in the doing of it, then they cannot ask this court "to give its aid to the enforcement of their agreement."

It is unnecessary for me to find in this case—and I do not propose to embark on that task—that there was anything in the nature of an agreement between the husband and the Irving Trust Company improperly to evade the Federal tax laws of the United States. But the principle underlying the passage which I have read from the judgment of Denning L.J., and which was part of the ratio decidendi of his judgment, applies, in my view,

[4] [1918] 1 K.B. 223.

[5] [1956] 2 Q.B. 490; [1956] 2 W.L.R. 204; [1956] 2 All E.R. 487.

[6] [1956] 2 Q.B. 515.

[7] [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292.

to such a case as this where a non-resident alien of the United States has so arranged his affairs that he has avoided payment of the withholding tax which he ought to have paid, and which he would have had to pay if the beneficial interest had been, as it should have been, disclosed to the American authorities.

Counsel for the husband argued that all the husband had really done was to arrange his affairs legitimately so as to lessen the tax which otherwise would have been payable, and he referred to the *Commissioner of Stamp Duties* v. *Byrnes*,[8] a decision of the Privy Council. In that case the testator had purchased some properties which he put into the names of his two sons by way of advancement, and subsequently received the rents and paid for rates and repairs. The Commissioner of Stamps made a claim against the executors in respect of the properties, contending that the gifts were made with an intent to avoid "payment "of duty" within the meaning of the New South Wales Stamp Duties Act, 1898. But the case turned purely on the evidence, and it was held that the transactions in question were not colourable but gifts out and out passing the properties to the sons to the exclusion of all interest in the father. That was therefore quite a different case from the present.

In the course of his judgment, Lord Macnaghten said[9]: "It "may be that in making these advances Mr. Byrnes was not "insensible to the advantage of diminishing the burthen of death "duties, but there is nothing wrong in that. No one may act in "contravention of the law. But no one is bound to leave his "property at the mercy of the revenue authorities if he can "legally escape their grasp." There is the nub of the whole thing—"no one may act in contravention of the law." But there was a clear breach of the Federal law in the way these transactions were carried out by the husband's non-disclosure of his beneficial interest in the securities and in the dividends paid thereon. He comes to this court seeking the aid of equity, and in the state of the authorities, and on that evidence, it appears to me that it is impossible for this court to help him.

There was an alternative claim for return of half the proceeds of the sale of the securities on the basis that that half was money had and received by the wife to the use of the husband. But once the equitable presumption of advancement arises, there is no room to entertain that common law claim. Either the presumption of advancement is rebutted, in which case the husband is entitled to his half share in the property, or, as I hold, it is not rebutted and the presumption remains. In the result, for the reasons which I have given, this action will be dismissed with costs.

Judgment for the defendant.

Solicitors: *Bull & Bull; Malkin, Cullis & Sumption.*

I. G. R. M.

[8] [1911] A.C. 386; 27 T.L.R. 408.

[9] [1911] A.C. 386, 392.

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Feb. 24, 25.

Harman J.

[CHANCERY DIVISION.]

In re STEED'S WILL TRUSTS.

[1958 S. No. 1486.]

Trust and Trustees—Variation of trusts—Act of 1958—*Protective trust—Application for variation—Opposition by trustees—Variation proposed by sole beneficiary—"Arrangement"—Power of court to override discretion of trustees—Variation of Trusts Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 53), *s.* 1.

By his will, a testator gave and devised certain farm property to his trustees upon trust for sale upon protective trusts, as defined by section 33 of the Trustee Act, 1925, for the benefit of the plaintiff for life, and after her death for such persons as she might by deed or will appoint, and in default of appointment, upon trust for the persons entitled on the distribution of her estate, with a proviso that the plaintiff should have the use and enjoyment of the capital value thereof if she needed it, and that the trustees might apply capital moneys arising on the sale of the farm to or for her benefit provided that they should consider the necessity for retaining sufficient capital to prevent her from ever being without adequate means. The testator also gave to the trustees a sum of £4,000 on trust for the plaintiff on the same protective trusts, and with similar powers of appointment by the plaintiff and for the use of capital for her benefit, and authorised the trustees to use the legacy for the purpose of providing a residence for her. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour.

On an application under section 1 of the Variation of Trusts Act, 1958,[1] for approval by the court of an "arrangement" proposed by the plaintiff varying the trusts so that the trustees would hold the farm and the legacy on trust for the plaintiff absolutely, which the trustees did not consider would be for the benefit of the plaintiff and declined to approve.

Held, that this was not an "arrangement" under the Act for there was no one to concur in it. Where trustees did not surrender their discretion to the court, the court had no power to override a proper exercise of this discretion.

Gisborne v. *Gisborne* (1877) 2 App.Cas. 300 applied.

[1] Variation of Trusts Act, 1958, s. 1: "(1) Where property, whether "real or personal, is held on trusts "arising, whether before or after the "passing of this Act, under any will, "settlement or other disposition, the "court may if it thinks fit by order "approve on behalf of— . . .

"(*d*) any person in respect of any "discretionary interest of his under "protective trusts where the interest "of the principal beneficiary has not "failed or determined, any arrange-"ment (by whomsoever proposed, "and whether or not there is any "other person beneficially interested "who is capable of assenting thereto) "varying or revoking all or any of "the trusts, . . .

"Provided that except by virtue of "paragraph (*d*) of this subsection the "court shall not approve an arrange-"ment on behalf of any person unless "the carrying out thereof would be "for the benefit of that person.

"(2) In the foregoing subsection "'protective trusts' means the trusts "specified in paragraphs (i) and (ii) "of subsection (1) of section thirty-"three of the Trustee Act, 1925, or "any like trusts, 'the principal bene-"'ficiary' has the same meaning as "in the said subsection (1) and "'discretionary interest' means an "interest arising under the trust "specified in paragraph (ii) of the said "subsection (1) or any like trust."

Held further, that, even if there was an arrangement which the court could approve, the jurisdiction to do so was discretionary and would not be exercised so as to override the decision of responsible trustees clothed with a delicate and difficult discretion which they wished to exercise in a certain way.

ADJOURNED SUMMONS.

By his will, dated August 6, 1954, the testator, Joshua Owen Steed, gave and devised to his trustees, by clause 9 thereof, "Loft Farm Cockfield upon trust to sell the same with power to "postpone such sale for so long as they in their absolute discretion "shall consider desirable and until any sale shall be effected "to hold such property and on sale the proceeds of sale thereof "upon protective trusts as defined by section 33 of the Trustee "Act 1925 for the benefit of . . . Gladys Louise Sandford during "her life And from and after the death of the said Gladys "Louise Sandford Upon trust to hold the said properties or the "proceeds of the sale thereof in trust for such person or persons "as the said Gladys Louise Sandford may by deed revocable "or irrevocable or by will or codicil appoint And in default of "appointment upon trust for the persons who may be entitled "in distribution to her estate Provided nevertheless and I here-"by declare that the settlement of this property upon the said "Gladys Louise Sandford is made for the purpose of providing "for her during her life but it is my wish that she shall have the "use and enjoyment of the capital value thereof if she needs it "during her life And I direct that if and when such property "shall be sold my Trustees may apply capital moneys from such "sale to or for her benefit at such times and in such proportions "as they may consider to be most to her advantage and that "any portion of the capital may be paid to her as income annually "or at any other periods which my Trustees may think desirable "provided that they shall consider the necessity for retaining "sufficient capital to prevent her from being without adequate "means at any time during her life and if they shall think it "desirable in her interest to buy an annuity for that purpose."

By clause 10, the testator gave a legacy of £4,000 to the trustees "upon trust to invest the same and to pay the income "therefrom to the said Gladys Louise Sandford during her life "and I hereby authorise my trustees to use this legacy if they "in their discretion shall deem it desirable for the purpose of "providing a residence for the said Gladys Louise Sandford either "by purchase or the building of a suitable residence with its "appurtenances in the names of my trustees or by lending it or "any part thereof on mortgage to her if she should purchase "such a residence and so that any residence purchased by my "trustees and this legacy shall be held by them on the same "protective trusts and with similar powers to use capital for her "benefit and with similar powers to her of appointment as are "directed with regard to the Loft Farm Cockfield but if the said

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"Gladys Louise Sandford shall not at any time live in the "residence or any residence so purchased she shall be entitled to "the income therefrom during her life and my trustees shall have "power to sell any residence so purchased and to buy or build "another for her use or to lend the said money to her for that "purpose."

The testator died on December 13, 1954, and his will was duly proved by the three defendants, the executors and trustees named therein. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour.

Loft Farm had been let by the testator to the plaintiff's brother, and the plaintiff desired the trustees to build a bungalow on the farm so that she could live there, but the trustees felt that that would not be to her advantage, and that the farm should be sold and the proceeds invested in some more profitable manner. The plaintiff's brother had paid the trustees no rent for the farm and had a number of judgment debts outstanding against him. On May 15, 1958, the plaintiff took out a summons asking the court, in pursuance of the powers conferred on it by the Variation of Trusts Act, 1958, to approve an arrangement varying the trust, whereby the trustees should stand possessed of the farm and the property, investments and cash representing the legacy upon trust for the plaintiff absolutely. The trustees opposed the proposals.

Eric Griffith for the plaintiff.
L. H. L. Cohen for the trustees.

No cases were cited in argument.

Harman J. This is an application arising in an action relating to the administration of the estate of Joshua Owen Steed of Long Melford in Suffolk. The testator died on December 13, 1954, and his will was proved by the three defendants, his executors, in March, 1955. He left about £60,000. He was served faithfully for many years at a very small wage, it would appear, by his housekeeper, the plaintiff, who is now a lady of some 53 years of age; and he made some provision for her by his will. The provision is not in its nature of a very ordinary kind.

[His Lordship referred to the relevant clauses of the will and continued:] After the testator's death, the plaintiff decided to go back and live in Long Melford; and the trustees bought her a café there. The plaintiff finds that working at the café is too much for her, and she has now for some time wanted the trustees to sell it. This they have expressed their willingness to do; but they have not done so, for some reason which is not at all clear to me, so that the position is that the plaintiff is still working in this café. She is, or was, considerably in debt as a result. About £2,000 of the legacy has been tied up in the

café, as well as her own savings which were invested in the stock-in-trade, and so forth.

The plaintiff has been unable to see eye to eye with the trustees. From the very start, her brother, who was and is tenant of the farm, has either paid no rent or has paid it by way of making allowances to her. He has not paid the trustees anything, and they have taken no proceedings against him. Her life, nevertheless, is very much bound up in his, and in that of his wife and daughter, of whom she is fond, and she has conceived the notion that she would like to get rid of the café, have a bungalow built for her on the farm, and go there to live, and perhaps dabble in chickens, or some such occupation. She says that that has always been her wish and her dream, and that that is how she wishes to conduct her life. At her age, she ought to know what she wants to do. The trustees have not, however, felt able to accede to her wishes. I do not say they have not been attentive to them; they think that any such arrangement will not be for her benefit or advantage, but for her brother's. He appears to be an impecunious person against whom several judgment debts are outstanding. The trustees want to sell the farm and invest the proceeds in some more profitable manner. They point out that they are under a duty to consider the necessity of retaining enough capital to prevent the plaintiff being without means at any time; and they have, or may have, entered into a contract—whether binding or not, I do not know—to sell the farm.

It was that which produced the writ in this action, a curious form of procedure, but there it is. On May 9 of last year a writ was issued claiming execution of the trusts created by clauses 9 and 10 of the will for the benefit of the plaintiff; and an injunction to restrain the defendants from selling the farm. Interlocutory proceedings were not necessary because the trustees agreed to hold their hand, and their proposed purchaser agreed to do the same, pending the working out of this present litigation. Then, a few days after the issue of the writ, the plaintiff issued this summons in the action asking for an order directing the defendants, as trustees of the will, to abstain from selling the farm without her consent, and further and other relief. Whether any such relief could be granted is a matter which I will not now discuss; but I am inclined to think that it could not. The trustees have a discretionary power which they do not surrender to the court. The court not only will not, but cannot, interfere with it. If a full administration order was made, that would sterilise the trustees' powers, and they could not exercise them without the leave of the court; but no case has been made here for an administration order, and to make one at the instance of a legatee in an estate which shows a large surplus would be a very high-handed thing to do, and not one which the court should indulge in.

The dispute has now taken a rather different turn. Why it has taken so long to come here, I do not know. The present situation is that the plaintiff is still set on retaining the farm,

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and going to live in a bungalow to be built for her by the trustees on part of it; and the trustees still say that in the exercise of their discretion they do not propose to do anything of the kind.

Pending this summons, the Variation of Trusts Act, 1958, was passed, and the writ has now been amended to refer to that Act and also to the Trustee Act, 1925, although I do not think that the present matter comes within section 57 of that Act. It is said now that what is wanted of the court is that "the arrangement specified in the schedule hereto may be approved in pursuance of the powers conferred by the Variation of Trusts Act, 1958." When you look at the "arrangement," it is that the trustees shall stand possessed of the farm and of the £4,000 upon trust for the plaintiff absolutely, the effect of which would be to revoke the trusts in clauses 9 and 10 of the will and to turn them into plain legacies to the plaintiff. When one turns to the Act, one finds that section 1 provides: "Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of," and then there is a list of persons being persons contingently interested, or children unborn, or persons having only a right under a discretionary trust. On behalf of any of those classes of persons, the court may approve "any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts"; and there is a proviso that no approval shall be given unless the court is of opinion that it will be for the benefit of the person on whose behalf the approval is sought, unless such a person is a mere possible object of a discretionary trust.

The so-called "arrangement" here is an arrangement which is simply an application at the plaintiff's behest to revoke all the trusts which stand between her and absolute dominion over these funds. What she wants to do is to override the discretionary powers given to the trustees and to take command instead. It is true that, if everybody possibly interested came to the trustees, they having such a discretion as this, and applied to them to hand over the funds, they must do so. That is not the position here. The plaintiff might hereafter marry. Mr. Griffith said that, assuming (as I do) that she is past possibility of issue so that any husband she may marry is a possible object of the discretionary trust, then it is on his behalf that the court may approve the arrangement without looking at his benefit, because he is only the object of a discretionary trust; and that, therefore, the court need not have regard to anyone's benefit, because the benefit of the plaintiff herself is not a matter mentioned in the Act, and it is an arrangement made by her. She has, says Mr. Griffith, so arranged her affairs, and the court has no further concern in the

matter except to approve it on behalf of this hypothetical and shadowy spouse.

I am not going to take that view of the Act. It seems to me that the arrangement to which the Act refers must be something arranged between A, B and C, whoever they may be. It is true that the Act specifically provides that there need be no other person beneficially interested capable of assenting to the arrangement; but does that mean that the arrangement can be made by A alone in face of the opposition of the trustees and that such a thing can be called an "arrangement"? I do not think so. The trustees here do not surrender their discretion to the court, and it has been the law for nearly 100 years since the decision in *Gisborne* v. *Gisborne* [1] that, where trustees are properly exercising their discretion, the court is without power to override them or to take that discretion out of their hands. Is it to be said that this Act was meant to enable a beneficiary not absolutely entitled to override the discretionary powers and protective trusts which the trustees desire to exercise? I think not. I do not think that I have any authority to do so, even if I would.

But, supposing that is wrong and the correct view is that which Mr. Griffith so ably pressed upon me, this is nevertheless a discretionary power under which the court may, if it thinks fit, by order approve an arrangement. I am, therefore, not bound to approve, though there be an arrangement and even though everybody of age approves of it and it is for the benefit of the non-existent parties. I still may think that it is not an arrangement which I ought to approve on behalf of the proposer. As I see it, the court's discretion is still absolute. The words "if it "thinks fit" are, after all, put in to reinforce the word "may"; and I should not feel it right, even if the proposal were within the word "arrangement," to override the discretion of the persons appointed by the testator to look after the plaintiff's affairs. This was the testator's money, and he was entitled, within limits, to dispose of it as he thought fit. In my view, it would not be right, where responsible trustees clothed with this kind of delicate and difficult discretionary power by the testator wish to exercise it in a certain way, for the court to say: "I know better than you, and "override the exercise of your discretion." That is not a thing which, in my view, was within the contemplation of the legislature when it conferred these powers on judges under this Act.

In my judgment, therefore, I do not feel that I can override the discretion of these trustees who, I am sure, will look with every sympathy on the plaintiff because she is, to all intents and purposes, the only person interested in this money; and it is only against herself that she has to be protected. Consequently, what may appear to be a right decision on the financial ground but which would break her heart may not be for her benefit. But all those things are matters for the trustees, and not for me,

[1] (1877) 2 App.Cas. 300.

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and I do not wish to say anything more about them. All that I can do with this present summons is to dismiss it, which I do. The trustees must have their costs and expenses out of the corpus of the fund.

Application dismissed.

Solicitors: *Field, Roscoe & Co. for Pretty, Dawson & Butters, Ipswich; Sharpe, Pritchard & Co. for Barr & Co., Cambridge.*

J. F. L.

[PRIVY COUNCIL.]

J. C.*

1959
March 19.

NEWCASTLE CITY COUNCIL . . . . . Appellant;

AND

ROYAL NEWCASTLE HOSPITAL . . . Respondent.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—New South Wales—Rates and rating—Exemption—Hospital (public)—Owner of adjoining unfenced physically unused vacant land—Intentional acquisition for purposes of hospital—Amenity advantages—Whether "used" for purposes of hospital—Statutory exemption from rates—Local Government Act, 1919 (*N.S.W.*), *s.* 132 (1) (*d*).

User of Land—Whether land "used"—Hospital—Adjacent virgin land owned by hospital with amenity value—Whether "used . . . for "the purposes" of the hospital—Local Government Act, 1919 (*N.S.W.*), *s.* 132 (1) (*d*).

Section 132 of the Local Government Act, 1919, of New South Wales provides: "(1) All land in a municipality . . . shall be rate-"able except . . . (*d*) land which belongs to any public "hospital . . . and is used or occupied by the hospital . . . for the "purposes thereof; . . ."

The respondent, a public hospital for the treatment of tuberculosis, owned 291 acres of unfenced land in its virgin state adjoining other land in the City of Newcastle owned by and on which the hospital stood. The 291 acres, of which the hospital made no physical use—it was vacant land intersected by steep gullies and heavily timbered—had been acquired for the purposes of the hospital, namely, to keep the atmosphere clear and unpolluted; to prevent building on the land; to provide quiet and serene surroundings for the patients; and to give room to expand the activities of the hospital. On a claim by the appellant local authority to recover rates on the 291 acres:—

Held, that an owner can use land by keeping it in its virgin state for his own special purposes, and the 291 acres, from which

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* *Present*: Viscount Simonds, Lord Cohen, Lord Somervell of Harrow and Lord Denning.

the hospital intentionally derived the above-specified advantages, were "used" for the purposes of the hospital and, accordingly, exempt from the payment of rates under section 132 (1) (*d*) of the Act of 1919.

Doubted, but observations on, whether the land was "occupied" by the hospital.

Judgment of the High Court of Australia (1957) 96 C.L.R. 493 affirmed.

APPEAL (No. 38 of 1958), by special leave, from a judgment of the High Court of Australia (March 21, 1957), affirming an order of the Supreme Court of New South Wales (June 18, 1956), which dismissed the present appellant's (the Newcastle City Council's) appeal from a judgment of Richardson J. (June 24, 1955), holding that the respondent, the Royal Newcastle Hospital, was not liable to pay rates in respect of a plot of land owned by it in the City of Newcastle.

The following facts are taken from the judgment of the Judicial Committee: In the city of Newcastle, New South Wales, there was a hospital called the Royal Newcastle Hospital, which received patients suffering from tuberculosis. It had about 100 beds. It was set in grounds laid out with lawns and gardens. Those grounds covered 17½ acres and were enclosed with a ring fence. Outside the fence the hospital owned 18½ acres of rough ground marked off by five white posts. Beyond that rough ground the hospital owned 291 acres of land which was still in its virgin state. Those 291 acres were traversed by ridges and gullies, which were heavily timbered, with a good deal of underwood. The gullies were steep and rough, some of them so steep that they were impassible. There was very little flat land. There were a few bush tracks, one of which was well defined: but there was no evidence sufficient to establish that it was used by patients or by the nursing staff. There was, in short, no physical use of the 291 acres by the hospital. It was just vacant land.

The city council claimed that the hospital was liable to pay rates on those 291 acres for the years 1946 to 1952 inclusive. It did not seek to make the hospital liable on either the 17½ acres or the 18½ acres, but only on the 291 acres. The sum claimed was £A4,001 9s. 8d.

At the hearing of the action, Richardson J. held that the 291 acres were exempt from rates. His decision was affirmed by a majority of the Supreme Court of New South Wales (Roper C.J. in Equity and Maguire J., with Owen J. dissenting), and their decision was in turn affirmed by a majority of the High Court of Australia (Williams, Webb and Taylor JJ., with Fullagar and Kitto JJ. dissenting).

The question in this appeal was whether the 291 acres were exempt from rating under the provisions of section 132 of the Local Government Act, 1919, of New South Wales, which provided: "(1) All land in a municipality . . . shall be rateable

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Newcastle City Council v. Royal Newcastle Hospital.

"except . . . (*d*) land which belongs to any public hospital . . . "and is used or occupied by the hospital . . . for the purposes "thereof; . . ."

1959. Feb. 12, 16, 17. *B. J. M. MacKenna Q.C.* and *Peter Oliver* for the appellant.

Gordon Wallace Q.C. (Australia) and *J. G. Le Quesne* for the respondent.

The following cases were cited in argument: *Knowles* v. *Newcastle Corporation* [1]; *Warringah Shire Council* v. *Salvation Army (N.S.W.) Property Trust* [2]; *McLean* v. *Burrangong Shire Council* [3]; *Colonial Treasurer* v. *Albury Municipal Council* [4]; *Commissioners of Taxation* v. *Trustees of St. Mark's Glebe* [5]; *Associated Cinema Properties Ltd.* v. *Hampstead Borough Council* [6]; *Westminster Council* v. *Southern Railway Co. Etc.* [7]; *Brake* v. *Inland Revenue Commissioners* [8]; *Liverpool Corporation* v. *Chorley Union Assessment Committee* [9]; *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* [10]; *Winstanley* v. *North Manchester Overseers* [11]; *London County Council* v. *Hackney Borough Council* [12]; *Doncaster Union Assessment Committee* v. *Manchester, Etc., Railway Co.* [13]; *Rex* v. *Mayor, Etc., of London* [14]; *Townley Mill Co. (1919) Ltd.* v. *Oldham Assessment Committee* [15]; *Smith* v. *New Forest Union Assessment Committee.* [16]

March 19. The judgment of their Lordships was delivered by Lord Denning, who stated the facts set out above and continued: It should be noticed at the outset that rates are levied in New South Wales, not on the occupiers, as in England, but on the owners: and they are calculated, not by reference to the annual value, as in England, but by reference to the unimproved capital value: and all land, occupied or unoccupied, is subject to the payment of rates unless it can be brought within one of the statutory exceptions. English rating decisions are, therefore, not of much help.

The Royal Newcastle Hospital is undoubtedly liable to pay rates on these 291 acres, unless the land comes within section 132

[1] (1909) 9 C.L.R. 534.
[2] 15 L.G.R.(Aus.) 91.
[3] (1914) 14 N.S.W.,S.R. 291.
[4] (1915) 15 N.S.W.,S.R. 320.
[5] [1902] A.C. 416; 18 T.L.R. 620.
[6] [1944] K.B. 412; 60 T.L.R. 275; [1944] 1 All E.R. 436.
[7] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.
[8] [1915] 1 K.B. 731; 31 T.L.R. 177.
[9] [1911] 1 K.B. 1057; 27 T.L.R. 230; [1912] 1 K.B. 270; 28 T.L.R. 177; [1913] A.C. 197; 29 T.L.R. 246.
[10] [1895] A.C. 117; 11 T.L.R. 132.
[11] [1910] A.C. 7; 26 T.L.R. 90.
[12] [1928] 2 K.B. 588; 44 T.L.R. 592.
[13] (1894) 71 L.T. 585; 10 T.L.R. 567.
[14] (1790) 4 T.R. 21.
[15] [1937] A.C. 419; 53 T.L.R. 205; [1937] 1 All E.R. 11.
[16] (1889) 61 L.T. 870.

(1) (*d*) of the Local Government Act, 1919, which exempts "land "which belongs to any public hospital, public benevolent institu- "tion, or public charity, and is used or occupied by the hospital, "institution or charity, as the case may be for the purposes "thereof."

The hospital acquired the land in a series of parcels from 1926 to 1946, namely, 92 acres in 1926, 4 acres in 1934, and 220 acres in 1946. There is no doubt that the hospital acquired all the land for the purposes of the hospital. Indeed, when the latest portion of it (220 acres) was compulsorily acquired in 1946, the Government Gazette expressly stated that it was "resumed for "the purposes of the Newcastle Hospital." According to the evidence these purposes were to keep the atmosphere clear and unpolluted: to prevent building upon the land and so act as a barrier against the approach of factories and houses: to provide quiet and serene surroundings for the patients: and to give room to expand the activities of the hospital. The land was undoubtedly *acquired and owned* for those purposes. But was it *used* or *occupied* for those purposes? That is the question.

Their Lordships are of opinion that it was *used* for those purposes. Mr. MacKenna submitted that an owner of land could not be said to use the land by leaving it unused: and that was all that had been done here. Their Lordships cannot accept this view. An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he has acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds. In the same way this hospital gets, and purposely gets, fresh air, peace and quiet, which are no mean advantages to it and its patients. True it is that the hospital would get the same advantages if the land were owned by the Crown or by a trust which had determined to keep it in a natural state, or by an owner who was under a restrictive covenant not to build on the land. But the advantages then would be fortuitous or at any rate outside the control of the hospital. Here they are intended, and that makes all the difference.

In these circumstances it is unnecessary for their Lordships to consider whether the 291 acres were "occupied" by the hospital: but in view of the argument submitted to them, their Lordships would say a few words on it. The hospital was undoubtedly in legal possession of the 291 acres; for the simple reason that, where no one else is in possession, possession follows title. But legal possession is not the same as occupation. Occupation is matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering, see Pollock and Wright on Possession in the Common Law, pp. 12, 13. There must be something actually done on the land, not necessarily on the whole, but

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on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as "occupied" by anyone: but everyone would say that a farmer "occupies" the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another. Their Lordships have some doubt whether these 291 acres were "occupied" by the hospital, because they were not fenced in or enclosed in any way, and it is difficult to say they were so much linked with the hospital grounds as to form part of an entire whole. But it is unnecessary to come to a conclusion on the point.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Kimbers; Light & Fulton.*

C. C.

[QUEEN'S BENCH DIVISION.]

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March 2, 3.
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STEPHENS *v.* CUCKFIELD RURAL DISTRICT COUNCIL.

[1958 S. No. 97.]

Town and Country Planning—Maintenance of waste land—"Garden, "vacant site or other open land"—Car breaker's yard in curtilage of building—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 33 (1).

The plaintiff was the owner of a piece of land on part of which, in about 1939, he erected structures for the purpose of a sawmill; the land surrounding the structures was used as a sawmill yard. In 1955 the use as a sawmill was abandoned and the land was let to car breakers, who used the surrounding yard of the premises as well as the old sawmill for car breaking. In 1957 the defendants, the local authority, served a notice on the plaintiff purporting to be pursuant to section 33 of the Town and Country Planning Act, 1947, stating that the condition of the open land within the curtilage of the premises was causing serious injury to the amenity of the district and ordering the removal from the land of all cars, car bodies and machinery. The plaintiff claimed a declaration that the land within the curtilage of his premises referred to in the notice was not "a garden, vacant site or other open land" within the meaning of section 33, and that the notice was of no effect in law:—

Held, that, on the true construction of section 33 of the Act of 1947, the words "garden, vacant site or other open land" had to be limited to a garden, vacant site or other open land which, at any rate, was not within the curtilage of a building; and as, in the present case, the notice specifically referred to open land within the curtilage of the premises, the notice was a nullity.

Quaere. Whether the right test of the application of section 33 is to consider whether, even if the land is not within the curtilage of a building, the existing use of the land is the same as that of the building.

ACTION.

The plaintiff, Horace John Stephens, was the owner of certain woodlands to the north of Parish Lane, Pease Pottage, Sussex. In about 1939 or 1940 the plaintiff erected on those woodlands certain buildings which were used for the purposes of a sawmill. In 1944 or 1945 the original sawmill was destroyed and was replaced by similar structures. The use of those structures for sawmilling purposes was abandoned some time prior to the middle of 1955. At some time in 1955 the plaintiff let part of his land for the purposes of a motor-cycle track. No planning permission was obtained for that use. About November, 1955, the land surrounding the structure began to be used as a car breaker's yard.

By his statement of claim the plaintiff alleged that from about November, 1955, until November 6, 1957, he let the land to Smith Goodwin for use by Sussex Car Breakers Ltd., in the course of their trade, and from November 7, 1957, the land and premises were leased to Sussex Car Breakers Ltd. for 21 years from November 2, 1957, to store vehicles and vehicle spare parts and/or for use as a vehicle workshop and offices in connection therewith. By a deed of variation dated November 21, 1957, the lease was varied so as to add to the purposes for which the land and premises could be used, the dismantling or breaking up of vehicles and/or the adapting for sale of any component parts thereof. The land and premises were used by the plaintiff before those leases from 1939 until about June, 1955, as a sawmill and the curtilage thereof. The land in question was surrounded on three sides by other land belonging to the plaintiff and on the fourth side was bounded by a public road. The plaintiff further alleged that between November 2, and 10, 1957, a continuous fence, six feet high, was erected along the side of the land that adjoined the road, and along the two sides adjacent thereto, and thereafter the land could not be seen from any public place.

The defendants, the Cuckfield Rural District Council, made no admissions as to the leases of the land, but it was agreed that at some date after the commencement of the car breaking user of the land, and before the date of the notice, a wire fence was erected around the land used for car breaking purposes. By their defence the defendants denied that the user of the land could not be seen from any public place.

On April 3, 1957, the defendants, the local planning authority, served on the plaintiff a notice, dated April 2, purporting to be a notice under section 33 of the Town and Country Planning Act, 1947,[1] which related to the land in question and stated, inter alia:

[1] Town and Country Planning Act, 1947, s. 33 (1): "If it appears to a "local planning authority that the "amenity of any part of the area of "that authority, or of any adjoining "area, is seriously injured by the "condition of any garden, vacant site "or other open land in their area, "then, subject to any directions given "by the Minister, the authority may

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"It appears to the said district council in the exercise of their "delegated powers that the condition of open land within the "curtilage of premises to the north of Parish Lane, Pease Pot-"tage, in the rural district of Cuckfield . . . is causing serious "injury to the amenity of part of the area of the said rural "district. The said district council in accordance with section 33 ". . . require for the purpose of abating the injury to the amenity "of the area within six weeks of the date on which this notice "takes effect such steps as are specified in the schedule hereto "shall be taken." The schedule stated: "Remove from the said "land all cars, car bodies and machinery." The notice was to take effect on May 8, 1957. On May 6, 1957, the plaintiff appealed to the magistrates' court for Haywards Heath and that court dismissed his appeal on August 12, 1957. On August 24, 1957, the plaintiff appealed from that decision to East Sussex Quarter Sessions and from the dismissal of that appeal by the appeals committee on November 2, 1957, the plaintiff appealed by way of case stated to the Divisional Court, which appeal was also dismissed.

By the present action the plaintiff claimed a declaration that the land to which the notice related was not a garden, vacant site or other open land within the meaning of section 33 of the Act of 1947, and that the notice served by the defendants on the plaintiff on April 3, 1957, was of no effect in law.

The defendants denied that at any material time either before or after the service of the notice the land was other than land to which section 33 applied, and they contended that whether or not the land was within the curtilage did not affect the application of section 33. They further denied that any specific curtilage attached to the structures used for the purpose of a sawmill, and also denied that the erection of the fence had the effect of making the land other than land to which section 33 applied.

G. G. Baker Q.C. and *Ronald M. Bell* for the plaintiff.
D. P. Kerrigan for the defendants.

Sinclair-Lockhart's Trustees v. *Central Land Board*[2] and *Caledonian Railway* v. *Turcan*[3] were cited in argument.

Lord Parker C.J. This case raises a point on which, as far as I know, there is no authority, and is one of some difficulty. It concerns the construction of section 33 of the Town and Country Planning Act, 1947. The matter has had a rather chequered

"serve on the owner and occupier of "the land, in the manner prescribed "by regulations under this Act, a "notice requiring such steps for abat-"ing the injury as may be specified "in the notice to be taken within "such period as may be so specified."

[2] (1950) 1 P. & C.R. 195; 1950 S.L.T. 283.

[3] [1898] A.C. 256.

history in that there have already been proceedings in the magistrates' court, an appeal to quarter sessions, and an appeal by way of case stated to a Divisional Court.

The plaintiff is the owner of land near the new town of Crawley, but off the main Brighton road and in a country area. Amongst the land which he owns is a piece of land of Tilgate Forest which, as long ago as 1939–40, he used for the purposes of a sawmill. On that land were put up structures, and the land surrounding the structures was used as a sawmill yard. About June, 1955, the use as a sawmill was discontinued and the user became a user for the breaking up of old motor-cars and the recovery of the parts thereof. I need not go into the details of it; it was, in fact, let to car breakers and is at the moment let to car breakers, and the business of car breaking is carried on not merely in the structure, that is the sawmill itself, but in the surrounding yard of the premises. I think everybody has seen the dumps of old motor-cars about the country, and one has every sympathy with the local authority in this case in trying to have that dump removed. The question is, whether they have power under the Act so to do.

That being the position by 1957, the defendants, the local authority, on April 3, 1957, served a notice pursuant to section 33 of the Act requiring the plaintiff, as owner, to remove from the said land all cars or bodies and machinery, and the said land is there described as open land within the curtilage of the premises.

Section 33, under which that notice was given, is in these terms: "(1) If it appears to a local planning authority that the "amenity of any part of the area of that authority, or of any "adjoining area, is seriously injured by the condition of any "garden, vacant site or other open land in their area, then, "subject to any directions given by the Minister, the authority "may serve on the owner and occupier of the land, in the manner "prescribed by regulations under this Act, a notice requiring such "steps for abating the injury as may be specified in the notice "to be taken within such period as may be so specified." By subsection (2) it is provided that there may be an appeal in the manner provided with regard to an enforcement notice under section 23 (3) to (5) and section 24, subject to modifications to be made by regulations.

It is convenient to refer to the notice served on April 3, 1957, which sets out the provisions in regard to appeal as prescribed by section 23 (4), as modified by regulation 7 (2) of the Town and Country Planning (General) Regulations, 1948, to read as follows: "If any person on whom an enforcement notice is served under "this section is aggrieved by the notice, he may, at any time "within the period mentioned in the last foregoing subsection, "appeal against the notice to a court of summary jurisdiction for "the petty sessional division or place within which the land to "which the notice relates is situated; and on any such appeal the

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"court—(*a*) if satisfied that the condition of the land to which "the notice relates is such as results in the ordinary course of "events from operations or a use for which permission was "granted under this Part of this Act, shall quash the notice to "which the appeal relates," and then (*c*) is the only other material one: ". . . in any other case shall dismiss the "appeal."

There was an appeal to the magistrates, and there the question was whether the user for car breaking was a use for which permission was granted under this Part of this Act. The point was this, that there being at the appointed day a user for a sawmill, that was, undoubtedly, a general industrial user. If the car breaking business or user for car breaking purposes was also a general industrial user, then the use was not one for which permission was granted by the Act, and the appeal would have to be dismissed, because it is observed that the jurisdiction of the magistrates in the matters which fell for their consideration is limited. If, on the other hand, the user for car breaking could be said to be a light industrial user, then, there being permission under the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, for a change from general industrial use to light industrial use, there would have been permission under the Act and the magistrates would have had to quash the notice. The point they had to decide, therefore, was: Was user for car breaking a general industrial use or not? They decided that it was; in other words, that no permission had been granted under the Act, and, accordingly, dismissed the notice. There was an appeal to quarter sessions where the same point was argued, and again they must have held to the same effect and the appeal was dismissed. From that there was a case stated to the Divisional Court and, as I understand it, the appeal by way of case stated was dismissed. Notwithstanding that, there are these proceedings, and they are proceedings open to the plaintiff because, as I have said, the jurisdiction of the magistrates was limited and they had no power, despite argument addressed to them, to consider the point which now arises in this action as to whether the land in question was a garden, vacant site or other open land within section 33 at all. That matter, as I understand it, was argued, at any rate, at quarter sessions, but it is perfectly clear that there was no jurisdiction to decide the point. Accordingly, in these proceedings the plaintiff claims a declaration that the original notice was void ab initio for the reason that this was not land to which section 33 applied.

It is a short point and not an easy one. The words of the section which I have already read seem to me to be very wide on their face. The section applies to any "garden, vacant site or "other open land," and it seems to me that those three phrases taken together are describing in the widest possible terms any land on which there is no building, land which is not built up. The reason, no doubt, for the use of the words "open land" in

that way is to make it perfectly clear that the draftsman is departing from the definition of "land" in section 119 of the Act, where "land" is described as including buildings. That, of course, is subject to the provision that the context should not otherwise require, and it seems to me that section 33 is dealing with any land which has not got a building on it. That, as it seems to me, is the literal interpretation.

It is to be observed—and both sides have referred to it—that the sidenote of the section is in these terms: "Power to require "proper maintenance of waste land, etc.," and it seemed to me at one time that if one was entitled to look at the sidenote, and, indeed, from the very wording of section 33, it might be said that Parliament had in mind the case of permissive waste, allowing a garden, for instance, to run to seed, and a vacant site to become unsightly; but I am quite clear, on further consideration, that there is no such limitation in this case. In particular, if one considers the words of regulation 7 (2) (*b*) of the Town and Country Planning (General) Regulations, 1948, modifying section 23, the words are "if satisfied that the condition of the "land to which the notice relates is such as results, in the ordin-"ary course of events, from operations or a use for which "permission has been granted," and that clearly envisages not permissive waste, not allowing the land to run to seed, but active operations and user of the land; and, accordingly, prima facie it seems to me that this section covers any operations or user of any open land in the sense of any land which is not built upon.

But, says Mr. Baker, and with considerable force, although that may be the literal interpretation as a matter of construction, reading this section in the scheme of the Act as a whole, there must be a limitation put on the words "garden, vacant site or "other open land." In particular he says that if no limitation at all is put upon those words, then it would follow that under these additional powers, beginning with section 26 and ending with section 33, there is power to prevent the continued user of land which is only being used for a legitimate existing use in connection with buildings, and, as he points out, if that were so it would enable the local authority, if they decided that the amenity of the neighbourhood was being injured, to, in effect, force somebody who had been carrying on a business there for some time to close down, because, I suppose, there are many users for general industrial purposes which cannot be carried on solely within the confines of the building, but where a builder's yard, or scrap heap, or something like that, is vital for the carrying on of the business. Surely, said Mr. Baker, Parliament could not have intended that section 33 should operate in that way. There is clearly no power to prevent the continued existing use of the building itself, and if section 33 were operated it would do in a back-handed way something which under the Act there was no power to do at all.

It is a formidable argument and, as I understand it, Mr.

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Kerrigan faces that position, but he says it is not quite as bad as it seems, because it will, in fact, only operate in that back-handed way, if I may use that expression, in a case where the use, though within the class of general industrial use, is a user which will affect amenities. Put in this way, he says: Supposing a sawmill had been carried on there, there would have been originally no loss of amenity, or there might be no loss of amenity and the premises could still be carried on for the sawmill and no objection would be taken; but the mere fact that, sawmilling being a general industrial user, there can be a change to car breaking does not, he says, prevent the local authority from saying that the new user, though lawful, is an injury to amenity. It follows, therefore, that even in that limited respect, section 33 is being used to do something for which there is no direct power, namely, to prevent a person carrying on an existing use for which there is no interference short of giving a notice under section 26 and paying compensation.

As I have said, it is not an easy point, but I am inclined, on the whole, to accept Mr. Baker's contention and to say that section 33, properly construed, must be limited to a case where, at any rate, the garden, vacant site or other open land is not within the curtilage of a building, and has not, as it were, acquired the user of that building. He points, in support of that contention, to the fact that in many places in this scheme of legislation, "building" does include, at any rate, the curtilage, and, as is conceded, section 33 cannot apply to buildings, and if one considers that in the treating of buildings under the Act there is included the curtilage, then, said Mr. Baker, there is every reason for construing section 33 (1) as applying to open land which does not form part of the curtilage.

The references that he makes are, first of all, to section 12 (2) (*d*), which, indeed, is the only occasion where curtilage is specifically referred to. That is a proviso to the necessity for obtaining permission for development, and, in effect, it is saying that permission is not required for the use of any building or other land within the curtilage of the dwelling-house for any purpose incidental to the development of the dwelling-house as such.

He also points to the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948, where in paragraph 2 (2) there appear these words at the very end: " . . . and "references to a building may, except where otherwise provided, "include references to land occupied therewith and used for the "same purposes." Curtilage is not referred to. It is dealing with the case where the land in question is, as it were, part and parcel of the building occupied and used for the same purpose as the building. In other words, to take the present case, if this had been a change to a light industrial use from a general industrial use, then the permission to do that would cover, not merely the building itself, but would, undoubtedly, cover this yard or area of land round the building.

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It seems to me here that, in order to make sense of this scheme of legislation, and to avoid the absurdity to which I have referred, one must limit the words "garden, vacant site or other "open land" to a garden, vacant site or other open land which is, at any rate, not within the curtilage of a building. I appreciate that that may give rise to questions in some cases as to what is, and what is not, within the curtilage of a building, and indeed, as I said, it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order of 1948, the land is occupied with a use for the same purposes as the building; but so far as the present case is concerned, there is no difficulty, because in the notice itself to which I have referred it is specifically dealing with the condition of open land within the curtilage of those premises.

Accordingly, on the view I take of the section, the notice of April, 1957, was a nullity, and, I suppose, all the proceedings that have been taken since have been nullities. I would hold that the plaintiff is entitled to the declaration claimed, which is a declaration that the land in question is not a garden, vacant site or other open land within the meaning of section 33 of the Act, and that the aforesaid notice served by the defendants upon the plaintiff on April 3, 1957, is of no effect in law.

Judgment for the plaintiff.

Solicitors: *Iliffe, Sweet & Co.; Sharpe, Pritchard & Co. for J. A. Churchill, Cuckfield.*

C. J. E.

[PROBATE, ETC., DIVISION.]

MORGAN v. MORGAN (ORSE. RANSOM).

1958 *Nov.* 4.

1959 *Jan.* 19, 20; *Feb.* 6.

Mr. Commissioner Latey Q.C.

Husband and Wife—Nullity—Approbation and sincerity—Incapacity of husband—Pre-marital acts—Overt acts and concealed thoughts—Agreement "tamquam sororem"—Discretion of court.

Marriage—Agreement to marry—"Tamquam sororem" condition—Whether void—Public policy—Elderly parties.

Public Policy—Husband and wife.

Estoppel—Conduct by—Husband and wife—"Tamquam sororem" marriage agreement—Whether husband estopped from relying on impotence when seeking nullity decree.

The parties went through a ceremony of marriage in pursuance of an agreement that they should live together on a basis of companionship only, the husband being, at that date, 72, and the wife 59 years of age. They never lived together owing to the conduct of the wife, who left the neighbourhood the day after the marriage and never returned, nor were sexual relations ever attempted between them. The husband subsequently obtained medical advice

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to the effect that he was impotent at the time of the ceremony of marriage. He, thereupon, filed a petition seeking a declaration of nullity on the ground of his own incapacity:—

Held, the husband's incapacity was not a factor in the marriage at all, and it would be contrary to justice and public policy to permit him to plead his own impotence, having regard to the companionship agreement; the petition should be dismissed.

Brodie v. *Brodie* [1917] P. 271; 33 T.L.R. 525 distinguished.

In *Scott* v. *Scott*, post, p. 497, Sachs J. held that on the authorities he was left with a discretion to refuse similar relief, and the court in the present case had a similar discretion.

G. v. *M.* (1885) 10 App.Cas. 171; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326 applied.

In considering whether and what pre-marital agreements have been reached between spouses, the court should have regard only to overt words and acts and not to the concealed thoughts of the parties.

Scott v. *Scott*, post, p. 497 followed.

Undefended petition for nullity.

The ceremony of marriage took place on January 25, 1958, the husband was a bachelor, aged 72, and the wife 59 years of age, she being a spinster. They had first met in 1953 at Richmond. He was on holiday there and he saw her every evening until he returned to his abode at Margate. When he left she kissed him goodbye at the station. She often visited him at Margate. On these occasions he booked a room for her at an hotel, spent the days with her, and saw her to her hotel, where she spent the night, he returning home. Apart from greeting and goodbye kisses there was no manifestation of affection between them. The husband's evidence was that that form of friendship continued for several years. He said that he loved the wife to some extent, and they liked each other's company. On various occasions she suggested that they should buy an annuity and that they should live more or less together, from the point of view of company, as she put it. Towards the end of 1957 they agreed to marry and that he should buy an annuity in her name, and she was to continue at her work. She intended to go to Australia after they married, and she told him to find a flat where they could live on her return. They were to marry on the basis of companionship. He had a small income from an annuity and the old-age pension.

The husband's evidence as to his state of mind at the inception of the marriage was as follows: Q. "You have made the remark "that she wanted a companionship marriage with you. At that "stage when you were discussing this matter, and indeed right "up to the date of this ceremony, were you agreeing to that "situation or not?"—A. "Yes." Q. "Yes. I want you to listen "very carefully to my next question and consider your answer "carefully. Tell my Lord this: did you ever hope that any "change might take place in that situation as far as the relation-"ship between you was concerned?"—A. "Well, naturally as "time goes on and we live together I might possibly have thought "possibly connection might be had, but otherwise—" Q. "You

"had that in mind?"—A. "I had that in mind, certainly, like "any man would do." Q. "You had it in mind like any man "would, after you had lived with her for some time?" —A. "Lived with her for some time." Q. "As husband and "wife?"—A. "Quite."

The husband also said that at the time of the marriage in January, 1958, he had never had sexual intercourse with any woman, and that he did not know that he was incapable of sexual intercourse.

After the ceremony they went to her hotel, where she had a room for two nights. He took his meals at his own address and then went to see her at her hotel, and saw her off to London the day after the ceremony. She had slept the night after the ceremony at her hotel, and he at his home.

After the ceremony he gave her a cheque for £2,000 for the annuity. Soon after she said: "I am worried. If I leave you "you shall have your money back." He tried to calm her down, but wanted the marriage to go on as arranged. His evidence continued as follows: Q. "You told us that she wanted a mar-"riage on what you called 'companionship terms'—something "like that?"—A. "Yes, exactly." Q. "What did you under-"stand her to mean by that?"—A. "Well, to put it bluntly to "you, she made it quite obvious to me—I said to her: 'Can I take "'you a cup of tea up in the mornings?' She said: 'No, I will "'lock the door first.' That was obviously the attitude she was "in." Q. "Let us do it completely. Did you understand or not "that she did not want to have sexual relations when you were "married?"—A. "Exactly, yes."

In reply to the question whether the wife had told him if she had ever had sexual experience, the husband said that she once told him, about a year or two before the marriage, that she had been seduced, and in that case she was a prostitute. She had a terrible temper and she went more or less mental at times with it. On the day after the marriage, a Sunday, she said nothing more about living with him. She said, before she left by train, "Don't "tell anybody about the wedding." He did not see her again until the Sunday previous to the hearing of his petition. She had written to him after the parting but he had not kept her letters. In her first letter she said she was very ill and could not work; she did not feel like a married woman, and was unhappy. Then she wrote and called him a cad and that she did not think she would live long. She had admitted one day before the marriage that she had a mental touch. She was very highly strung and she went for him one day as much as to say: "I will murder "you." He said he liked the girl so he put up with it all. She told him in a letter after the marriage to remain at Margate as his "digs" were cheap, and she would let him know directly she went to Australia. Later she wrote asking him to see her solicitor. In July, 1958, he went to see the solicitor, a member

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of a firm of great experience in matrimonial causes, who told him that the wife regretted directly after the ceremony having married him, and that the husband would probably get some of the money back. In fact, the cheque had passed through the bank early in February, 1958, and he had not received any of the money back.

The husband, having obtained legal advice, presented his petition in August, 1958, and it was duly served on the wife, who took no action. Three days before the hearing took place on November 4, 1958, the wife paid him an unexpected visit at Margate. She told him that he would not lose all his money. He tried to persuade her to start all over again but she refused. There was no discussion, he said, about the pending petition.

The husband's evidence as to his own state of health was that since 1919 he had suffered from a form of colitis; he had felt giddy at times; and he had a double hernia, for which he wore a truss, upon which he had been advised that it would be dangerous to operate. A doctor examined him on July 29, 1958; he found no malformation of the genital organs, but taking into account his age and a combination of physical weaknesses he gave the definite opinion that the husband was impotent at the time of the marriage.

The matter was adjourned for argument by the Queen's Proctor.

Graham Dow for the husband.

James Comyn for the Queen's Proctor.

The following cases were cited in argument in addition to those referred to in the judgment: *W.* v. *H.**; *C.* v. *C.*†; *B.* v. *B.*‡; *F.* v. *F.*§

Mr. Commissioner Latey Q.C. reading his judgment referred to the facts, as set out above, and continued: I may say that it is well known that a man may be both perfectly virile and fertile in his seventies, but the doctor did not submit the husband to certain tests which are familiar to doctors expert in this branch of medicine. I do not propose to detail the medical evidence. I regret the failure to bring in medical inspectors, who by their experience are of invaluable help to the court in nullity cases. After some hesitation, however, and bearing in mind the decision in the Court of Appeal in *Hodgkins* v. *Hodgkins* [1] as to the standard of proof in such cases, I accept the evidence of the husband and the doctor that the husband was incurably impotent at the time of the ceremony.

It would follow in the ordinary case from this finding that on

* (1861) 2 Sw. & Tr. 240.

† [1921] P. 399; sub nom. *Colman* v. *Colman*, 37 T.L.R. 759.

‡ [1901] P. 39.

§ 1945 S.C. 202.

[1] [1950] P. 183; 66 T.L.R.(Pt. 1) 1011; [1950] 1 All E.R. 619.

the authority of the Court of Appeal in *Harthan* v. *Harthan*[2] the husband petitioner would be entitled to a declaration of nullity of marriage on the ground of his own impotence. But there were extraordinary circumstances in connection with this contract of marriage raising difficulties affecting the public interest which caused me to seek the assistance of the Queen's Proctor. The question which arose was whether the husband was debarred from the relief he claimed by reason of his having entered into this marriage on the basis of mere companionship and without any intention of marital intercourse, and whether this court, which must always treat nullity cases as of national importance irrespective of the wishes of the parties, can accept the husband's mental reservations as to the bare possibility of marital intercourse in the future.

On the facts as to the pre-marital arrangement and what followed I accept the husband as a truthful witness. I also assume that he was not aware of the law as to nullity of marriage until at any rate some months after the marriage. But for his assertion of his own impotence, and possibly the companionship understanding, it is clear that he might have obtained a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage. That remedy was barred, however, the moment his legal advisers became aware of his assertion of impotence.

On January 19 and 20, 1959, I heard the arguments of counsel. In *Harthan* v. *Harthan*,[3] which was not defended by the respondent wife, Lord Merriman P. in his comprehensive review of this aspect of the law of nullity held that under the pre-reformation canon law an impotent spouse could plead his or her impotence, provided (a) that he did not know of such impotence when the ceremony took place and had not deceived the other spouse; and (b) the other spouse did not know at that time of such impotence; and neither the statute nor common law had interfered in this respect with the pre-reformation canon law which—under the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 21 and 56 (3), perpetuating the principles of the old ecclesiastical court—is still operative. In *Harthan* v. *Harthan*[3] the husband petitioner, who was granted a declaration of nullity, had made futile attempts at intercourse within the first five years of his marriage. In arguendo in that case counsel incidentally drew attention to a phrase which has been employed from time to time in nullity cases, viz.—of a man marrying a woman tamquam sororem—as if a sister.

Mr. Comyn, in his able and well-reasoned address on behalf of the Queen's Proctor, has illustrated its use in various cases: for example, *Briggs* v. *Morgan*[4]; *Guest* v. *Shipley* (*falsely calling herself Guest*)[5] and *Brown* v. *Brown*,[6] in which Sir J. Nicholl

[2] [1949] P. 115; [1948] 2 All E.R. 639.
[3] [1949] P. 115.
[4] (1820) 2 Hag.Con. 324.
[5] (1820) 2 Hag.Con. 321.
[6] (1828) 1 Hag.Ecc. 523.

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said[7] in the Court of Arches: "... a man of sixty who marries "a woman of fifty-two should be content to take her tanquam "soror." Mr. Comyn submitted that it was not more than an obiter dictum. The expression is to be found in the works of the old canonists. Sanchez, the seventeenth-century canonist, in laying down certain principles as to nullity, wrote, inter alia, that an incapable man could suffer no hardship if required to maintain his wife tamquam sororem (Disp. CXIV, lib. VII). In my view this phrase became a convenient verbal vehicle in the context of some cases of nullity in the ecclesiastical courts but does not embody any legal principle.

Mr. Comyn, for the Queen's Proctor, accepting as a fact that at the time of this marriage the husband was impotent, deprecated the order dispensing with the examination by medical inspectors. I have already said that I agree with this view. In this class of case, where a petitioner is asking for relief owing to his or her own impotence the ordinary practice of calling at least one of the medical inspectors into the witness box to deal with the results of his examination is at least as essential as in the ordinary case. He submitted that on the facts as we know them the petitioner ought to have been very doubtful of his sexual capacity and of the likelihood or not of having marital intercourse, and as a reasonable man should have been put on inquiry as to his own condition. He pointed out that, if the marriage were valid, it was a clear case of desertion by the wife immediately after the ceremony, for which the husband could obtain a divorce after the expiry of the three years laid down by statute.

It was maintained for the Queen's Proctor that the husband must show that the non-consummation was due to his own misfortune, but his incapacity was purely incidental to the married status. Supposing a man marries a woman knowing that she was incurably stricken with poliomyelitis or so crippled that sexual intercourse was impossible: he could not claim nullity on the ground of his own impotence. Having regard to the circumstances in which this marriage was contracted he could not make a grievance now of what did not occur to him a grievance then. On this point Mr. Comyn drew attention to the practice of pleading in the ecclesiastical courts as illustrated in the fifth paragraph of the libel in *B.* v. *M.*[8] emphasising the sexual desire of the male spouse as an important factor, however frustrated, in entering into marriage. Mr. Comyn pointed out that in *Harthan* v. *Harthan*[9] it was laid down that both parties would have to be ignorant of the supposed incapacity of one of them, but in this case there was no evidence that the wife was ignorant of it or not. Lord Merriman P. said[10] that the reaction of the wife respondent to the impotence of the husband petitioner

[7] (1828) 1 Hag.Ecc. 523, 524.
[8] (1852) 2 Rob.Ecc. 580.
[9] [1949] P. 115.
[10] Ibid. 143.

should be taken into account in considering whether the circumstances of the case as a whole, including the respondent's attitude, were such as to debar the impotent spouse from suing.

Pausing at this stage of the argument put forward on behalf of the Queen's Proctor, I should be disposed to regard this statement of principle as irrelevant in the circumstances of this case insomuch as the wife never put the husband's potency to the test, and has abstained from any defence so that I must assume that her reaction to the petition was favourable.

Mr. Comyn urged that the petition failed for lack of sincerity and bona fides and that it would be inequitable and contrary to public policy to grant the husband the relief he sought. He pointed out that when the cohabitatio triennalis of olden days was discarded by our courts long ago—the period during which spouses in a certain type of case were expected to try and try again—there was left a discretion in the court to decide whether it was just or right to annul a marriage, and that discretion still survived. He invoked well-known passages in the classic case of *G.* v. *M.*[11] extracted from the speeches of Lord Selborne L.C.[12] and Lord Watson,[13] to show that in this case there was conduct on the part of the husband which ought to debar him from the remedy he sought. Counsel submitted that from the standpoint of public interest it was a vitally important case. Having entered into the marriage on the basis of companionship the husband should not in equity or justice be allowed to claim relief from it on the ground of his own impotence.

Mr. Graham Dow, for the husband, submitted that in this case all the requirements laid down in *Harthan* v. *Harthan*[14] had been satisfied. At the time of the ceremony neither he nor the wife was aware of his impotence, and the reaction of the wife to the position was evidenced by her not defending it. Unless there was an overriding discretion in the court to refuse the relief sought the husband was entitled to a decree. The point at issue turned on the principles of approbation and reprobation. In *Clifford* v. *Clifford*[15] the expression "sincerity," so often used in the past in nullity cases based on the impotence of a respondent, was considered by the Court of Appeal, and Mr. Dow quoted passages from the judgments of Tucker[16] and Bucknill L.JJ.,[17] to show that the present petitioner was not lacking in sincerity in seeking this relief. He also invoked part of the judgment of Langton J. in *Nash* v. *Nash*[18] to the same effect, that the petitioner was not lacking in sincerity.

The question of the money transferred to the wife formed no part of the husband's motive here, he said. He referred to

[11] (1885) 10 App.Cas. 171; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326.

[12] 10 App.Cas. 171, 184.

[13] Ibid. 197.

[14] [1949] P. 115.

[15] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.

[16] [1948] P. 190.

[17] Ibid. 195.

[18] [1940] P. 60, 69; 56 T.L.R. 274; [1940] 1 All E.R. 206.

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Lord Watson's statement of principle in *G.* v. *M.*[19] as to the existence of a rule in the law of England, namely: "... that "in a suit for nullity of marriage there may be facts and circum-"stances proved which so plainly imply, on the part of the "complaining spouse, a recognition of the existence and validity "of the marriage, as to render it most inequitable and contrary "to public policy that he or she should be permitted to go on "to challenge it with effect." But here the husband had done nothing to recognise the validity of the marriage.

Counsel distinguished the recent decision of Sachs J. in *Scott* v. *Scott*,[20] a case of approbation to which I must refer later. Mr. Dow referred to the observation of Cozens-Hardy M.R. in *G.* v. *G.*[21] (in that case a decree was granted to each spouse on the ground of the other's impotence), and the observation that he referred to was that the court should exercise its discretion very carefully in granting relief in a nullity suit by a petitioner on the ground of his own impotence, but in this case he argued that that ground having been taken, and the husband here having proved his incapacity, a decree should follow.

In support of his case he referred to certain passages in the argument of Mr. J. E. S. Simon, for the King's Proctor, in *Harthan* v. *Harthan*.[22] Before the marriage here, though the basis of companionship was agreed upon, the husband had a secret thought that he might persuade the wife to have marital intercourse, and it was not an irrevocable agreement. As he was given no opportunity to consummate the marriage it would be just and equitable to grant the relief sought.

Lastly, Mr. Dow dealt with Lord Selborne's statement of the principle in *G.* v. *M.*[23] in dealing with the somewhat ambiguous word "sincerity," namely: "... there may be conduct on the "part of the person seeking this remedy which ought to estop "that person from having it: as, for instance, any act from which "the inference ought to be drawn that during the antecedent "time the party has, with a knowledge of the facts, and of the "law, approbated the marriage which he or she afterwards seeks "to get rid of, or has taken advantages and derived benefits from "the matrimonial relation which it would be unfair and inequit-"able to permit him, or her, after having received them, to treat "as if no such relation had ever existed. ... The circumstances "which may justify it are various, and in cases of this kind many "sorts of conduct might exist, taking pecuniary benefits for "example, living for a long time together in the same house or "family with the status and character of husband and wife, "after knowledge of everything which it is material to know. I "do not at all mean to say that there may not be other circum-"stances which would produce the same effect; but it appears "to me that, in order to justify any such doctrine as that which

[19] 10 App.Cas. 171, 197.
[20] Post, p. 497.
[21] (1908) 25 T.L.R. 328.
[22] [1949] P. 115, 120–125.
[23] 10 App.Cas. 171, 186.

" has been insisted upon at the bar, there must be a foundation " of substantial justice, depending upon the acts and conduct of " the party sought to be barred."

In this case, said Mr. Dow in conclusion, there was no conduct by the husband after the ceremony to bar relief. The facts were unique and no dangerous precedent would be created in pronouncing a decree.

In reply, Mr. Comyn argued that the pre-marital companionship agreement must be taken into account, and that constituted an act which barred the husband's decree in accordance with the last sentence of the passage in Lord Selborne's statement of principle. That being the conclusion of the arguments, I reserved judgment.

I have endeavoured, in my judgment, to state the substance of the arguments by both counsel, to both of whom I am indebted for their able addresses. First of all, I ought to point out that nearly all the cases cited, with the exception of *Harthan* v. *Harthan*,[24] concerned petitions for nullity by one spouse on the ground of the other's impotence, and although the principles laid down by the Earl of Selborne (Lord Chancellor) and Lord Watson in *G.* v. *M.*[25] are still generally applicable, they might have been somewhat differently phrased if the House of Lords had been dealing with a case in which a petitioner pleaded his own impotence.

At a time when the canon law was well known to the canonists, Dr. Ayliffe in his famous work " Parergon Juris Canonici " Anglicani " (published in 1727 and referred to in *Harthan* v. *Harthan*[26]) wrote: " The husband may pray a separation of " matrimony on the account of a matrimonial impediment, though " such impediment proceeds and arises from himself, as from his " own impotency and frigidity; but if he knowingly marries a " woman that cannot render him his due, he is (notwithstanding) " bound to maintain her and shall not be divorced from her; for " he ought to impute it to himself."

In the language of those days " divorce " was often used when " nullity " was meant, there being no divorce a vinculo except in very exceptional and limited circumstances under the canon law.

The whole pith of this case is the pre-marital companionship agreement. In the ordinary case of a younger couple the agreement itself would be void as against public policy as held in *Brodie* v. *Brodie*,[27] and it would not avoid the marriage. The agreement to live apart and the marriage in that case were contracted because the wife was about to have a child by the husband; but the marriage subsisted notwithstanding. Many elderly and aged people intermarry on the basis, implied or agreed upon, that they come together merely for companionship and without any thought of sexual relations. In some such cases,

[24] [1949] P. 115.
[25] 10 App.Cas. 171.
[26] [1949] P. 115, 133.
[27] [1917] P. 271; 33 T.L.R. 525.

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owing to advanced age or physical infirmity one or other of the spouses might be able to prove after the marriage his or her impotence, without having had any thought of it when the marriage was arranged or solemnised, and without putting it to the test afterwards. Supposing one of these elderly or aged spouses in that condition found that he or she was not happy in this union, would it be just or right to allow him or her to plead impotence for the purpose of getting rid of the marriage? Having regard to their agreement I should say that was an act, though premarital, which would bar the remedy.

Scott v. *Scott* [28] was a husband's petition based on the grounds of the wife's wilful refusal to consummate the marriage or her incapacity, and Sachs J. rejected the petition on the ground of the husband's approbation of the marriage for four years, there having been a clear pre-marital understanding between the parties that, in view of the wife's expressed distaste for the sexual act he would not seek marital intercourse against her wishes, unless he could persuade her to change her mind, but if he failed so to persuade her it would not matter. Within the first year after the marriage the husband made two or three half-hearted attempts at intercourse to which the wife demurred, and, thereafter, he abstained without indicating that her refusal was a grievance. He accepted the situation until he met another woman whom he wished to marry.

I have had the advantage of perusing the judgment of Sachs J. In it he referred, inter alia, to *W.* v. *W.*,[29] *Tindall* v. *Tindall*,[30] and *Slater* v. *Slater*,[31] and these cases have also been cited before me in the present case. From the cases cited, including preeminently *G.* v. *M.*,[32] Sachs J. extracted several principles, one of which is particularly relevant to the present case, which is, that it is the overt words and acts of the husband that should be looked at, and these should be judged by their own nature and declared intention, without regard to concealed thoughts. Following the same line, I cannot accept the husband's somewhat vague mention of his mental reservation as to perhaps having sexual intercourse in the future as reliable. It was the only point in his evidence that I felt was unreliable.

On this point I adopt the words used in the Report of the Archbishops' Commission on the Law of Nullity of Marriage (1955), p. 27: "In English ecclesiastical law no agreement or "private determination is allowed to nullify a marriage, even "though it involves the frustration of one of the principal ends of "matrimony. English law looks to the consent as expressed, and "will not allow the parties privately to derogate from their public "professions."

[28] Post, p. 497.

[29] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

[30] [1953] P. 63; [1953] 2 W.L.R. 158; [1953] 1 All E.R. 139.

[31] [1953] P. 235; [1953] 2 W.L.R. 170; [1953] 1 All E.R. 246.

[32] 10 App.Cas. 171.

In other words, mental reservations cannot in English law invalidate a marriage duly celebrated.

Sachs J. held that on the authorities he was left with a discretion to refuse the relief sought, and following *G.* v. *M.*[32] he did so. I feel that in this case I must do the same. I accept in substance the arguments put forward on behalf of the Queen's Proctor. The marriage was valid notwithstanding the pre-marital agreement. The husband's incapacity was not a factor in the marriage at all, and it would be contrary to justice and public policy to allow the husband successfully to plead his own impotence, having regard to the companionship agreement. His remedy would seem to rest on divorce for desertion in due course. The petition must, therefore, be dismissed.

Order accordingly.

Solicitors: *Girling, Wilson & Harvie, Margate; The Queen's Proctor.*

E. J.

[32] 10 App.Cas. 171.

NOTE

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Husband and Wife—Nullity—Approbation and sincerity—Incapacity of husband—Approbation of marriage for four years—Pre-marital understanding "tamquam sororem."

PETITION by husband for a decree of nullity on the ground of incapacity or wilful refusal. At the time of the marriage the husband was aged 43, a widower who had spent his life working in various branches of an insurance office. The wife was aged 40 at the time of the marriage, a spinster, who at the date of the hearing was still a virgin. She too had served in an insurance office for over 20 years and prior to the engagement was in a safe career leading towards a pension of £400 per annum. The husband's first wife had died in January, 1949. Her death had been preceded by a considerable period of ill health when sexual intercourse had not been practicable. In September, 1949, the husband proposed marriage to his present wife. At first the wife declined the proposal; her reasons included doubts at changing, at her stage of life, from a settled existence with the prospects of a pension at 55, to a new and far less independent existence. They also included her distaste for the idea of sexual intercourse. These matters were discussed between the parties with frankness. As regards sexual intercourse she told him that she had "absolutely no interest in the physical side of married life." She also told him that she had at an unusually early age undergone the change of life. The husband, in view of the wife's expressed lack of desire for the sexual act, gave her to understand that, while he hoped to persuade her to change her attitude, he would not seek to have sexual intercourse against her wishes; and further, that if he failed to achieve that change in her attitude then "it would not "matter," in the sense that so far as he was concerned the marriage

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could and would continue as one of sharing life, but without sexual intercourse. He viewed the components in marriage other than sexual intercourse as highly important. The wife accepted his statements and, while not excluding the possibility that sexual intercourse might ensue on his persuasion, was content with his assurance that "it would not "matter" if this did not happen. That position continued until April 15, 1950, when the marriage took place. Until about the end of 1951 the husband continued to hope that he could persuade the wife to accept sexual intercourse. He made two or three half-hearted attempts at intercourse and also had certain conversations with his wife on the subject. On each occasion, however, the wife made it clear that her wishes were unaltered. Both then and when the "attempts" took place the wife was conscious that the husband was disappointed at her attitude. However, he gave her no indication that her refusal of sexual intercourse was something which in the circumstances he regarded as a grievance or as something which might lead to the break-up of the marriage. On the contrary, he both then and later made it clear to her that he accepted and was content with the marriage in the shape that it in fact took.

At some stage in or about 1951 the husband ceased to raise the topic of sexual intercourse in conversation. It was at this point that, having tried out the marriage in the way which the wife wished it to be carried on, he accepted that way of living just as he had, before the marriage, said he would. Whatever may have been his hopes up to that time he then gave them up and made that fact known to the wife. Thereafter, until some time in 1956, the parties continued to find great happiness in each other's company and the husband throughout not merely acquiesced in there being no sexual intercourse, but genuinely accepted the marriage without it. That acceptance was made plain to his wife. In June, 1956, the husband met and began an association with a married woman. On the morning of January 1, 1957, he told the wife that he was leaving her, was not coming back except to pack, and was about to file the present petition. His evidence at trial was that the wife's reaction was one of surprise. The wife's evidence that the information came to her as a bomb-shell and rendered her, as she put it, "nearly demented" was accepted by the court. Within 48 hours of having been thus apprised that the husband regarded the question of sexual intercourse as fundamental and that its absence put the marriage in peril, the wife wrote to the husband, to whom she remained devoted, a sincere letter, one sentence in which was meant to convey and did convey to the husband an offer of sexual intercourse. The husband remained in the matrimonial home. His evidence was that he continued there "in his own interest" and had no intention of becoming reconciled to his wife, far less of having sexual intercourse with her: he had made up his mind to continue and did continue with the other woman that association which he concealed from his wife till well after his petition was put on the file.

From January to May, 1957, the husband and wife remained under the same roof, but the period was an unhappy one for both. On May 21, 1957, the husband caused this petition to be served upon her, and at the beginning of June, 1957, he left the matrimonial home. At the date of the hearing he was living with the other woman who, notwithstanding that fact, was granted a decree nisi of divorce by Sachs J. in proceedings which were interposed in the course of the hearing of the nullity suit.

The wife, by her answer, referred to the agreement and alleged that the husband had approbated the marriage and sought a decree of divorce on the ground of the husband's adultery with the other woman.

It was common ground that the marriage had never been consummated.

Dimitry Tolstoy for the husband.
Jack Sarch for the wife.

The cases cited in argument were referred to in the judgment.

Cur. adv. vult.

November 27. SACHS J., reading his judgment, stating that he preferred the evidence of the wife and her witnesses to that of the husband, referred to the facts and continued: It being common ground that the marriage has never been consummated, I now turn to the main issues between the parties, viz., whether the husband, on his side, has proved either incapacity on the part of the wife, or that the marriage has not been consummated "owing to the wilful refusal of the respondent to "consummate the marriage"; and whether the wife, on her side, has proved that there has been such conduct on the part of the husband as to preclude him from being granted a decree, even if he succeeds on one of the two issues which he has set out to establish.

First of all, however, it is convenient to refer to one other matter that was much canvassed in the course of the trial—that is, the effect of the mutual understanding that "it would not matter" if there was no sexual intercourse.

In evidence, the wife, with characteristic fairness, never referred to this understanding as an agreement, but rather as a matter of mutual explanations as to what was the attitude of each party to the prospective engagement. Even, however, if it could be said to be an "agree-"ment" (and it probably bears all the outward characteristics of a collateral agreement other than an intention to create legal relations), it is to be noted that at the time the husband was known to be capable of sexual intercourse, and it certainly was not known that the wife was incapable. In those circumstances, any such agreement would be one striking fundamentally at the basis of marriage itself, and would undoubtedly be void as between the parties (cf. *Brodie* v. *Brodie* [1]). Equally clearly, it could impose no fetter on the court in granting a decree of nullity if the facts so warranted.

On the other hand, the very fact that such an understanding or agreement is reached may be of considerable importance when it becomes necessary to draw inferences in relation to matters vital to the determination of other issues in the case.

Normally, it would be apposite next to deal with the issues of incapacity and wilful refusal. These, however, present certain difficulties, not least as to what are the inferences which ought to be drawn from the primary facts as proved in evidence. Moreoever, even if the husband were to succeed on either of those issues, he must still meet the defence that his conduct has precluded him from being granted relief. The facts relating to that defence being clear, it thus seems best to deal with it first and examine whether it is decisive.

The present case is one in which it is perfectly plain that there has been a considerable period when the husband was, despite the absence of sexual intercourse, truly content with a devoted marriage, and made it clear to his wife that, despite that absence, he fully accepted the marriage.

On those facts arises the clear-cut question as to whether such an acceptance over a period of the order of four years constitutes a bar to the petitioner's claim. Now that 101 years have passed since the date

[1] [1917] P. 271; 33 T.L.R. 525.

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of the first Matrimonial Causes Act, it could be expected that the books would provide a firm basis for the answer to that question; but one's confidence in that behalf is not unduly enhanced on finding that in every reported case on this topic that has gone to the Court of Appeal in the last decade the trial judge has been reversed.

The locus classicus for expositions of the relevant law (a branch of that sometimes described by the much criticised word "insincerity") is *G.* v. *M.*[2] There Lord Watson stated[3]: ". . . in a suit for nullity "of marriage there may be facts and circumstances proved which so "plainly imply, on the part of the complaining spouse, a recognition "of the existence and validity of the marriage, as to render it most "inequitable and contrary to public policy that he or she should be "permitted to go on to challenge it with effect"; and that passage has been described by Singleton L.J.[4] as the most clear, and by Jenkins L.J.[5] as the most succinct, statement of the law. The Earl of Selborne in an almost equally frequently quoted passage said[6]: ". . . there "may be conduct on the part of the person seeking this remedy which "ought to estop that person from having it . . ." After giving examples of such conduct, including, first, approbation of the marriage with knowledge of the facts and law and, secondly, the taking advantages from the matrimonial relation which would make it inequitable or unfair to treat that relation as if it never existed, he later went on to say as regards this bar[7]: "The circumstances which may justify it are "various, and in cases of this kind many sorts of conduct might exist, "taking pecuniary benefits for example, living for a long time together "in the same house or family with the status and character of husband "and wife, after knowledge of everything which it is material to know," and[8] ". . . there must be a foundation of substantial justice, depend-"ing upon the acts and conduct of the party sought to be barred."

It is, of course, obvious from the phrases used by the Lords of Appeal, that neither of them were suggesting that the spouse who seeks to set up the bar must necessarily prove all those ingredients which are required to establish an estoppel in pais: nor have the recent authorities so laid down; though it would naturally be difficult to imagine a case where those ingredients were all proved and there was no bar. The word "estop" is used in the broad sense of "bar."

In relation to any narrow technical use of the word "estop" in connection with this bar, with its concomitant concept of a specific change in the position of a respondent spouse, it is also to be noted that such an alteration in the position of a devoted but non capax wife on account of her husband's conduct in approbating the marriage would normally be hard indeed to establish, for the only effect of the approbation would be to make her want not to change the position. So it is on the footing that to establish a bar it is not necessary to prove the equivalent of an estoppel in pais that I now turn to the recent authorities which have been so carefully cited to me by Mr. Sarch and by Mr. Tolstoy, to see what other points directly relevant to the present facts and binding upon a court of first instance can be gathered from them. In particular, I refer to four of the cases which reached the Court of Appeal, *Clifford* v. *Clifford*,[9] *W.* v. *W.*,[10] *Tindall* v. *Tindall*,[11] and *Slater* v. *Slater*.[12]

[2] (1885) 10 App.Cas. 171.
[3] Ibid. 197.
[4] *Tindall* v. *Tindall* [1953] P. 63, 69; [1953] 1 All E.R. 139.
[5] *W.* v. *W.* [1953] P. 152, 164; [1952] 1 All E.R. 858.
[6] 10 App.Cas. 171, 186.
[7] Ibid.
[8] Ibid.
[9] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.
[10] [1952] P. 152; [1951] 1 T.L.R. 879; [1952] 1 All E.R. 858.
[11] [1953] P. 63; [1953] 2 W.L.R. 158; [1953] 1 All E.R. 139.
[12] [1953] P. 235; [1953] 2 W.L.R. 170; [1953] 1 All E.R. 246.

From these it appears that (1) the remedy sought is a personal one as between husband and wife, and it is to the conduct as between these two that the court should look; (2) it is the overt words and acts of the husband that should be looked at and these should be judged by their own nature and declared intention, without regard to concealed thoughts; (3) the mere fact that a long time has elapsed between the date of the marriage and the date proceedings were commenced does not of itself constitute a bar; (4) the mere fact that each party continues to share, whilst under the same matrimonial roof, the normal mutual domestic services derivable from a joint establishment, does not of itself constitute a bar; (5) the mere receipt of financial benefits does not of itself constitute a bar; (6) if the present facts do constitute a bar, it is a discretionary and not an absolute bar.

It is, however, to be noted as regards both the third and fourth points that in each case cited to me where it was held that the petitioner was not barred, there either was evidence of continuing complaints or separation or, alternatively, there was no apparent argument that the absence of sexual intercourse had been the subject of affirmative acceptance or contented acquiescence on the part of the petitioner.

Into the former category fall *G.* v. *M.*[13] (see Lord FitzGerald's speech [14]), and *Clifford* v. *Clifford*[15] (see the judgment of Tucker L.J.[16]). Into the latter falls *Clarke* (*orse. Talbott*) v. *Clarke*[17] as determined by Pilcher J.

Accordingly, the law in cases where the petitioning spouse has contentedly acquiesced in or expressly accepted a married life without sexual intercourse has not been held to be inconsistent with that applied in the well-known judgment of Sir Robert Phillimore in *W.* v. *R.*[18] when dismissing a petition for nullity some ten years before *G.* v. *M.*[19] There, after a very full review of the authorities (including the Privy Council opinion in *B.* v. *B.*,[20] as delivered by Dr. Lushington), Sir Robert Phillimore referred to the judgment of Lord Penzance in *M.* v. *C.*[21] in which he stated[22]: " . . . the petitioner is " bound to have evinced impatience under a sense of wrong and a reason- " able activity in complaint and redress. The court cannot recognise " these features in the conduct of the petitioner. On the contrary, she " appears to have lived contentedly enough with her husband until, as " she says, he ill-treated her." That passage was quoted with approval by Tucker L.J. in *Clifford* v. *Clifford*[23] and he went on to say of the facts before him[24]: " It is not a case in which he was acquiescing in " his wife's disability, and contentedly leading a married life until " some incident arose, such as ill-treatment of his wife by the husband, " as referred to by Sir Robert Phillimore in *W.* v. *R.*[25] This case is " different: the husband was throughout seventeen years of his married " life showing himself dissatisfied with the state of affairs which " existed."

R. v. *R.*[26] referred to in Latey on Divorce, 14th ed. (1952), p. 202, seems also to support the reasoning adopted in the above cited passages.

At this stage it is necessary to deal with the point taken by Mr. Tolstoy that the husband was not at the material times aware of his right to seek the remedy for which he now prays.

In all the cases dealing with the type of bar under consideration

[13] 10 App.Cas. 171.
[14] Ibid. 206.
[15] [1948] P. 187.
[16] Ibid. 194.
[17] [1943] 2 All E.R. 540.
[18] (1876) 1 P.D. 405, 410.
[19] (1885) 10 App.Cas. 171.
[20] (1854) 1 Eccl. & Adm. 248.
[21] (1872) L.R. 2 P.D. 414.
[22] Ibid. 419.
[23] [1948] P. 187, 193.
[24] Ibid. 194.
[25] 1 P.D. 405.
[26] Unreported, November 14, 1934, aff. February 25, 1935.

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stress has been laid on the fact that there can be no bar if the petitioner was not sufficiently aware that the remedy of a decree of nullity was available. When referring to the requisite that the petitioner must have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress, Lord Penzance in *M.* v. *C.*[27], however, prefaced his statement with the words: "The general "circumstances of each case and the facilities of the party aggrieved "for obtaining legal advice and assistance will vary indefinitely . . ."

In the present case the husband had for many years been employed in a responsible position in the head office of a well-known insurance company and was, as he admitted, very well placed for getting any desirable legal advice. Moreover, he never suggested that he was not aware that nullity proceedings were available where a marriage was not consummated, but alleged that, by the time he gave up hope of sexual intercourse, three years had passed since the marriage and he thought that by virtue of something equivalent to a statute of limitations the remedy was then no longer open to him. That plea I reject for more than one reason. First, I have, as already stated, come to the conclusion that he gave up hope well before three years had passed after the marriage: next, his testimony on this point was so unconvincingly given that I am not prepared to accept it as rebutting the presumption of knowledge of the law to which Jenkins L.J. referred in *W.* v. *W.*[28] and, further, in any event his complete failure to make any inquiry for so long a period is the converse to that impatience and reasonable activity to which Lord Penzance referred.[27]

In the result, accordingly, although no specific change in the wife's position has been shown to result from the husband's above-stated contented acceptance as from 1952 of the marriage without sexual intercourse, there seems to be authority for holding that his conduct constitutes a bar within the rule as laid down by Lord Watson in *G.* v. *M.*[29] In so concluding I am, of course, not overlooking the fact that there are, in the authorities cited to me, a number of statements which could be construed as requiring some specific detriment to the wife since 1952 to be proved before the bar could come into existence. Those passages, however, occur in judgments concerned with facts different to those of the present case and were not intended to narrow down the breadth of the rule as stated by Lord Watson: and any narrowing down of that type would indeed be inconsistent with that range of the varieties of circumstances capable of constituting the bar which has been referred to by the Earl of Selborne in *G.* v. *M.*[30] and by Birkett L.J. in *Tindall* v. *Tindall.*[31]

In relation to this question of specific change I have already adverted to the position of a wife such as the respondent in this case. Looking, however, at the position of husbands and wives from a more general point of view, it is relevant to note that, at any rate as regards those of reasonably mature age, the gradual passage of time inevitably effects each year some degree of change in the physical and material existence of each individual and his or her prospects, and that, if anything, such changes are liable to be more pronounced for women than for men. Each year that passes is thus liable to affect the position of a woman as regards what will be her future if she ceases to have as husband the man to whom she thinks she is married. Moreover, the case can also arise of a wife whose incapacity derives only from frigiditas quoad hunc—she being otherwise apta viro—who would be in a position herself to seek a decree of nullity on that

[27] (1872) L.R. 2 P.D. 414, 419.
[28] [1952] P. 152, 165.
[29] 10 App.Cas. 171, 197.
[30] Ibid. 186.
[31] [1953] P. 63, 76

ground, who, being less devoted than the respondent in this case, might, at any rate, have considered initiating such a petition if her husband had not made clear his acceptance of the marriage without sexual intercourse, but who could not, years later on becoming a respondent, point to any specific detriment except the passage of time.

Taking, accordingly, that broad view of substantial justice which is inherent in the above cited phrases of the Earl of Selbourne and Lord Watson, it would to my mind be, indeed, surprising if the law permitted a man who had accepted the marriage for a considerable time nevertheless to turn round at any moment at his whim and then, as of absolute right, claim a decree that the marriage never existed: and if support is needed for that view it can be found, I think, in what Dr. Lushington said in *B.* v. *B.*[32] Such a state of affairs would lead to situations in which the granting of a decree would have that element of inhumanity to which Sir Robert Phillimore referred in *W.* v. *R.*[33] Thus, the existence of a bar in cases such as the present accords with the general sense of Lord Watson's words as well as with the authorities, such as *W.* v. *R.*[34]: any hard cases resulting from its existence can be dealt with by the court's exercise of discretion.

Whether the facts which constitute the bar in this case can be said to fall within some term such as recognition of, approbation of or election to be bound by the marriage, improper delay, or some other compendious expression, is a matter upon which I prefer not to embark. The authorities make it clear that no single word or short expression can embrace or was ever intended to embrace all the circumstances that cause the bar to arise.

The next question, accordingly, is whether this is a case in which the bar should be applied. On this I assume that the whole history of the marriage and the ages and other circumstances of the parties can be taken into account. On the facts of the present case the court's discretion should not, in my view, be exercised in favour of a man of the petitioner's age, who incidentally has stated that he does not desire to found a family.

Here reference must be made once more to the fact that the wife, to the husband's knowledge, gave up the prospect of a £400-per-annum pension to marry him. Whilst against the submissions that this pre-marriage change of position by the wife could be taken into account when deciding whether there was a bar, it seems to me that it could properly be put in the scales on the question of discretion, though I did not find it necessary so to use it.

It follows that in the present case the husband is barred from obtaining the decree he seeks and the prayer of the petitioner must be rejected.

[His Lordship then referred to the evidence on the issues of incapacity and wilful refusal, holding as to the former that at all material times consummation was probably impracticable but doubting whether impracticability had, in view of the fact that delay by a petitioner added to the burden of proof upon him, been proved with the clarity required in a nullity suit. He further held that although there was a persistent and considered refusal by the wife, in view of the pre-marital agreement and the conduct of the husband thereafter the non-consummation could not, in law, be said to be "owing to" that refusal.]

Solicitors: *W. G. Street & Co.; Saunders, Son & de Wolfe.*

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[32] 1 Eccl. & Adm. 248, 260, 261.
[33] 1 P.D. 405, 408.
[34] 1 P.D. 405.

[QUEEN'S BENCH DIVISION.]

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Feb. 25, 26, 27.

Lord Parker C.J.

MACE *v.* R. & H. GREEN AND SILLEY WEIR LTD. AND BRITISH INDIA STEAM NAVIGATION CO. LTD.

[1957 M. No. 2108.]

Negligence—Safe system of work—Access to place of work—Work on third party's premises—Hold of ship.

Dock—Regulations—Safe means of access—Hold of ship—Bagged cargo unloaded — Spillage not cleared — Hold "in which work is being "carried on" — Meaning of "work" — Work on the processes— "Loading, unloading"—Meaning of "unloading"—Docks Regulations, 1934 (*S.R. & O.*, 1934, *No.* 279), *reg.* 11 (1).

Shipping—Loading or discharge—Meaning—Bagged cargo unloaded but spillage not cleared.

The plaintiff, a boilerman employed by ship repairers, was instructed by his chargehand to open the manhole doors in the floor of one of the holds of a ship. The ship was still being unloaded, but the hold in which the plaintiff was required to work had been cleared of a bagged cargo of castor seed the previous day, except for spillage and dunnage which the crew were clearing and stacking at the time the plaintiff went down to do his work. Having completed his work the plaintiff, while ascending a ladder giving access from the hold to the 'tween deck, caught his foot in a rope wound round one of the rungs, slipped and fell, sustaining injury. He sued his employers, alleging negligence, and the shipowners alleging, inter alia, a breach of regulation 11 (1) of the Docks Regulations, 1934,[1] in failing to provide a safe means of access to the place in which the work was being carried on:—

Held, (1) that the rope in the position on the ladder constituted a danger so that the means of access was unsafe, but the employers were entitled to assume, in the absence of notice, that the premises in which their employees were to work were safe and that nothing had been done by those working there to make them unsafe; accordingly, there was no breach by the employers of the duty of care they owed to the plaintiff and his case against them failed.

Smith v. *Austin Lifts Ltd.* [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81 applied.

(2) That the words "in which work is being carried on" in regulation 11 (1) meant "in which work on the processes is being carried on," the processes being those covered by Part II (which include loading and unloading); and that regulation 11 (1) was a general one so that the duty imposed thereunder on the owner, master or officer in charge of a ship was not confined merely to persons employed in those processes.

Bryers v. *Canadian Pacific Steamship Ltd.* [1957] 1 Q.B. 134; [1957] 3 W.L.R. 993; [1957] 3 All E.R. 572 applied.

(3) That the clearing up of spillage was ancillary to and part of the process of unloading or loading and, accordingly, at the time the accident occurred, the Docks Regulations applied. As, on the facts found, there was not a safe means of access from the hold to the lower 'tween deck there had been a breach by the shipowners of

[1] Docks Regulations, 1934, reg. 11: "(1) If the depth from the level "of the deck to the bottom of the "hold exceeds five feet, there shall be "maintained safe means of access "from the deck to the hold in which "the work is being carried on."

regulation 11 (1) and the plaintiff was entitled to succeed against them.

Manchester Ship Canal Co. v. *Director of Public Prosecutions* [1930] 1 K.B. 547; 46 T.L.R. 163; *Hawkins* v. *Thames Stevedore Co. Ltd. and Union Cold Storage Co. Ltd.* [1936] 2 All E.R. 472 considered.

ACTION.

The following facts are summarised from the judgment: On Saturday, May 30, 1953, the plaintiff, Henry Edward Mace, an experienced boilermaker employed by the first defendants, R. & H. Green and Silley Weir Ltd., ship repairers, was sent by his chargehand to open up the manhole doors of a tank forming the floor of No. 1 hold of the *S.S. Kenya*, a ship owned by the second defendants, British India Steam Navigation Co. Ltd. The plaintiff was accompanied by his mate, one Edgcumbe. The ship was a modern passenger and cargo vessel of 12,000 tons or more which was doing a turn round in wet dock at the Royal Albert Docks. She had discharged her passengers and was in course of unloading a cargo of castor seed in bags. The cargo had, except for spillage, been discharged from No. 1 hold the previous day, but unloading was proceeding in the other holds and reloading was due to begin the following Monday. On the Saturday afternoon some of the ship's Lascar crew were down in No. 1 hold, where the plaintiff was required to work, sweeping up the spillage and removing it, clearing up the mats and stacking the boards forming the dunnage. Other employees of the first defendants were on various other parts of the ship doing minor repairs and maintenance work during the turn round.

The way down to No. 1 hold was by ladders, first, from the main deck to the first 'tween deck, from the first 'tween deck to the second 'tween deck and from the second 'tween deck to the hold and the tank top. The ladders were sloping, that from the lower 'tween deck to the hold being of slightly unusual construction in that the stringers were made of angle iron and the rungs of thick half-inch mild steel, flat bars, about 10 or 10½ inches wide between the stringers. There were, in addition, vertical ladders, but the sloping ladders were those generally used by the men.

The plaintiff and his mate completed their work on the manhole doors. Edgcumbe went back up the sloping ladder ahead of the plaintiff. The plaintiff, having ascended 15 feet of the ladder from the hold, slipped and fell to the ground sustaining injuries.

In an action for damages for personal injuries which the plaintiff brought against his employers and the shipowners, he alleged that there was a rope wound loosely round a rung of the ladder in which he caught his foot, so causing him to slip and fall. He alleged negligence against his employers, claiming that they had failed in the common law duty owed by a master to his servant to see that the premises were reasonably safe for use, in particular by permitting the rope to be wound round the ladder

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and in failing to take any or any sufficient steps whether by examination or inspection or by the removal of the rope. He also alleged that the lighting was inadequate.

Against the shipowners, the plaintiff alleged a breach of their statutory obligation under regulation 11 (1) of the Docks Regulations, 1934, to provide safe means of access from the deck to the hold in which work was being carried on. Alternatively, he alleged a breach of the duty owed at common law by invitor to invitee.

Both defendants denied liability. They denied that there was a rope in the position claimed by the plaintiff or any rope. Both alleged contributory negligence on the part of the plaintiff. The shipowners also contended that the Docks Regulations, 1934, did not apply.

Charles Doughty Q.C. and *J. G. K. Sheldon* for the plaintiff.

R. Marven Everett Q.C. and *H. Tudor Evans* for the employers.

Montague Berryman Q.C. and *W. G. Wingate* for the shipowners.

The following cases relevant to this report (other than those referred to in the judgment) were cited in argument: *Hodgson* v. *British Arc Welding Co.*[2]; *Thomson* v. *Cremin.*[3]

Lord Parker C.J. This matter arises nearly six years after the event. I am not saying that anybody is particularly to blame but it makes the task of witnesses and of the court extremely difficult. Memories, anyhow, are liable to fail and after six years they are almost bound to fail. Moreover, one is bound to be suspicious of a plaintiff's claim in those circumstances; one approaches the matter on the basis that it may be something that he has gradually in the course of time conjured up, and one is bound to look at his evidence with great suspicion. Again, from the point of view of the court, it is often impossible in these circumstances to accept the whole of the evidence of any one witness, however honest he is and however much he may be trying to tell the truth. Six years after the event witnesses may with the best will in the world be at fault. [His Lordship stated the facts, reviewed the evidence and made the following findings of fact: (1) that there was a rope wound round a rung of the ladder in about the position in which the plaintiff had alleged it to be; (2) that it was the rope that had caused him to slip; (3) that the rope in the position his Lordship had found it to be was a danger and that it prevented the ladder from being a safe means of access; (4) that the lighting was adequate. His Lordship continued:]

[2] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

[3] [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103n.

I will consider first the respective cases against the defendants. The first defendants, the employers, say, quite shortly, that the lower hold was not in their control: it was in the control of the shipowners; the shipowners were the occupiers. True, the duty on the employers to take reasonable care remains, but in all the circumstances reasonable care did not, they claim, call for an inspection by them, the first defendants, of this ladder. At one time it was often thought that where a master sent his servant to work on somebody else's premises he owed no duty to the servant in regard to those premises. I think that that was a misunderstanding as to the true position and that, as has been indicated by the Court of Appeal in *Davie* v. *New Merton Board Mills Ltd.*[1] and in *Wilson* v. *Tyneside Window Cleaning Co.*,[2] a duty to take reasonable care is always there but the performance of it will vary according to all the circumstances including the question whether the premises are in the occupation and control of another person. I should add that, if my reading of *Smith* v. *Austin Lifts Ltd.*[3] is right, what was said in *Wilson* v. *Tyneside Window Cleaning Co.*[4] has, in effect, been approved in the House of Lords. That being so, I have to ask myself as a jury, whether reasonable care in these circumstances demanded some inspection by the first defendants. I think it is clear that if the cause of the fall had been some defect in the ladder itself it could not be suggested that the first defendants were at fault in not seeing that the ladder was structurally sound. They would have no reason to suspect that it was not. The ship was a modern ship. The second defendants, were well known and reputable shipowners and there would be nothing to suggest that a reasonable employer ought to go and inspect the ladder. Nor do I think that this was a case where the nature of the work demanded an inspection and a laying out, as it were, for the safety of the workmen. For these experienced men, who, I have no doubt, had done the same sort of job hundreds of times, nothing more was required than that they should be told to go and do it. It seems to me that the only way it can be put by the plaintiff here is to say that there were a lot of men working there; the stevedores had just finished unloading the bags, some of the ship's crew were there cleaning up; there were potential dangers all the time; and in those circumstances either the foreman boiler maker, or the chargehand should have gone down with the men to see that everything was all right for them to work. It is said that it would have been easy for them to have done so, but it seems to me that this is a jury question and, sitting as a jury and considering the matter as best I can, I cannot think that reasonable care demanded any such course of action. In these circumstances I

[1] [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67.

[2] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

[3] [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81.

[4] [1958] 2 Q.B. 110.

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think that ship repairers on a ship doing a hundred and one jobs during the course of the turn round of the ship must be entitled to assume, in the absence of notice of some kind—and when I say "in the absence of notice of some kind," I am thinking, in particular, of *Smith* v. *Austin Lifts Ltd.*[5]—that the premises where the men are going to be sent to work are safe and that those who have been and are working there have not done anything to make them unsafe. I feel constrained to hold that there has been no breach by the first defendants of the duty of reasonable care.

I now come to the case against the second defendants. I will deal first with regulation 11 (1) of the Docks Regulations, 1934. That regulation is made pursuant to powers contained in the Factory and Workshops Act, 1901, in respect of certain processes, the processes being of "loading, unloading, moving and handling "goods in, on, or at any dock, wharf, or quay, and the processes "of loading, unloading and coaling any ship in any dock, harbour, "or canal," and it is directed "that they shall apply to all "docks, wharves, quays and ships as aforesaid." The duty under regulation 11 (which is in Part II) is a duty of the owner, master, or officer in charge of the ship. Accordingly, the regulations deal with and are under the umbrella of these particular processes. That is the first thing to observe. The second thing to observe is that regulation 11 does not apply, as many of the regulations do, merely to persons employed, namely, persons employed in the processes. It is perfectly general, and, following the recent House of Lords decision in *Bryers* v. *Canadian Pacific Steamship Ltd.*,[6] the plaintiff qualifies, if one may put it that way, for protection under regulation 11. But the real question is whether regulation 11 (1) applies at all in the circumstances of this case where, although unloading was being done in other parts of the ship, the actual unloading of the bags and cargo had been completed in No. 1 hold on the previous Friday evening and the hatch covers on the main deck had been put on.

Mr. Berryman, for the shipowners, relies very strongly on the last few words of regulation 11 (1), namely: "in which work "is being carried on." He argues that those words must mean "in which work on the processes is being carried on." Mr. Doughty for the plaintiff, on the other hand, contends that although the whole of this comes under the umbrella of "pro-"cesses," yet so long as the ship, looked at as a whole, is still being unloaded it matters not that the actual work in the hold in question is not of the character of unloading. He points to other regulations such as regulation 12, where, when the reference is to processes, it says so—"When the processes are being carried "on"—and he contrasts that with the expression "in which "work is being carried on." In regulation 11 (1) I confess that it seems to me that as a matter of construction the words "in

[5] [1959] 1 W.L.R. 100.

[6] [1957] 1 Q.B. 134; [1957] 3 W.L.R. 993; [1957] 3 All E.R. 572.

"which work is being carried on" must mean work on the processes, and I accept Mr. Berryman's contention on that point.

But the matter does not end there because Mr. Doughty goes on to contend that even if that is so there was work still going on in this hold which was at any rate connected with the processes and ancillary to them. He argues that, true, the bagged cargo had been unloaded, but it is wrong to speak of the unloading having been completed when there are still "goods" in the hold, namely, spillage which has to be swept up and which has to be taken up to the decks above and disposed of. He submits that the process of unloading, and, he would add, of handling goods, has not been completed until the spillage has been cleared up and, he would add, the dunnage also.

There appears to be no authority on this point. Reference has been made to two cases, namely, *Manchester Ship Canal Company* v. *Director of Public Prosecutions*[7] and *Hawkins* v. *Thames Stevedore Co. Ltd. and Union Cold Storage Co. Ltd.*[8] I need not refer to those cases. It is enough to say that it was held in the one case that the closing of the hatchcovers, at any rate on the main deck, was part of the process of unloading, and, in the other case, of loading, albeit ancillary to it; and, as it was put in those cases, the process of unloading or loading, as the case may be, is not completed until the hatch covers are put on. I do not read those cases as saying that if the hatch covers are put on that is of itself conclusive evidence that the unloading or the loading has been completed. I treat them as authority for the fact that the process of unloading is something which one may look upon as a wide description of a process involving matters that have to be judged in connection therewith and ancillary thereto, such as closing hatch covers, and, if I am right in approaching it in that way, then it seems to me that the clearing up of the spillage—and I need not go further than that and deal with dunnage—is ancillary to the process of unloading, and, if not ancillary to the process of unloading, it would be ancillary to the process of loading. It is certainly something which has to be done in connection with the unloading and the loading, and I think it would be wrong to say that the moment the bagged or cased cargo has been removed the process has ended and that thereupon there is an interval during which some other process is carried on, namely, sweeping up and preparing. It seems to me that the sweeping up of the spillage is really to be looked at as ancillary to and part of the process of unloading. Accordingly, in my judgment, at the time when this accident occurred, the Dock Regulations applied and on the findings that I have already made there was not then a safe means of access from the lower hold to the lower 'tween deck.

[His Lordship then said that on the view he had taken of

[7] [1930] 1 K.B. 547; 46 T.L.R. 163.

[8] [1936] 2 All E.R. 472.

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regulation 11 (1) it was unnecessary for him to deal with the plaintiff's alternative allegation against the second defendants based on the duty of invitor to invitee, but he would shortly state his views on it. The case fell to be decided under the law prior to the Occupiers' Liability Act, 1957, in other words, under the law enunciated in *Horton* v. *London Graving Dock Co.*[9] As there was here an unusual danger, the sole question was whether the plaintiff had a full appreciation of it. On the evidence, he thought that the real probabilities were that the plaintiff saw the rope and thought it would cause no trouble; but whatever the true position, he was not satisfied that the plaintiff had a full appreciation of the danger in the way that the matter was dealt with by Denning L.J. in *Smith* v. *Austin Lifts Ltd.*[10] and if he were wrong in holding the second defendants liable under the Dock Regulations he would say that they were under a liability as invitor.

His Lordship then dealt with the allegation of contributory negligence made against the plaintiff. He held the plaintiff guilty of contributory negligence and awarded liability in the proportion of two-thirds to the second defendants and one-third to the plaintiff. Special damages being agreed at £3,330, his Lordship assessed general damages at £6,000 and accordingly awarded the plaintiff £6,220 against the second defendants.]

Judgment for first defendant against the plaintiff. Judgment for the plaintiff against second defendant.

Solicitors: *Shaen, Roscoe & Co.; Barlow, Lyde & Gilbert; Botterell & Roche.*

E. M. W.

[9] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[10] [1959] 1 W.L.R. 100, 116.

[House of Lords.]

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Feb. 23, 24, 25; *Mar.* 25.

QUALCAST (WOLVERHAMPTON) LTD. . Appellant;

and

HAYNES . . . . . Respondent.

Negligence—Safe system of work—General precautions—Metal welding—Protective clothing available for workmen—No orders or advice to wear it—Workman injured—Employers' liability.

Judicial Precedent—Question of fact—Jury question—Decision of judge on it not a precedent.

† *Present*: Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning.

Fact or Law—Negligence—Standard of care—Always a question of fact. Law Report—Reporting of decisions—No principle of law—Standard of care issue in action for negligence.

While handling a ladle of molten metal in a foundry an experienced moulder was injured when the ladle slipped splashing the metal on to his foot. He was not wearing protective spats which would have prevented the injury, although his employers, to his knowledge, kept a stock of them available for the asking; he had not been ordered or advised to wear them. He sued his employers for negligence. The county court judge considered that the plaintiff was so experienced that he needed no warning, and that there was therefore no negligence on the part of the defendants, but held that he was bound by authority to decide otherwise:—

Held, that the county court judge erred in law in holding that he was so bound by authority, for the issue whether the defendants ought to have urged the plaintiff to wear the spats was one of fact, and (Lord Cohen dissenting) there was no reason to differ from the judge's view that there was no negligence on the part of the employers in regard to this particular workman.

Per Lord Somervell. If the reasons given by a judge for arriving at a conclusion previously reached by a jury are to be treated as "law" and citable, the precedent system will die from a surfeit of authorities.

Decision of the Court of Appeal [1958] 1 W.L.R. 225; [1958] 1 All E.R. 441 reversed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Parker and Sellers L.JJ.).

This was an appeal from an order of the Court of Appeal dated January 24, 1958, ordering that the appeal of the appellants, Qualcast (Wolverhampton) Ltd., from a judgment of Judge R. H. Norris, dated August 16, 1957, and given at the Wolverhampton County Court should be dismissed and that the appellants should pay the costs of that appeal. The appellants were defendants in the action in the county court and the respondent, John Henry Haynes, was plaintiff.

The facts are set out in the opinion of Lord Keith of Avonholm.

R. Marven Everett Q.C. and *H. J. Garrard* for the appellant company.

John Thompson Q.C. and *Irvon Sunderland* for the respondent.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *Paris* v. *Stepney Borough Council* [1]; *Winter* v. *Cardiff Rural District Council* [2]; *Smith* v. *Austin Lifts Ltd.* [3]; *Wilson* v. *Tyneside Window Cleaning Co.* [4]; *Glasgow Corporation* v. *Muir* [5]; *Crookall* v. *Vickers-*

[1] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[2] [1950] 1 All E.R. 819; 114 J.P. 234.

[3] [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81.

[4] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

[5] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44.

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Armstrong Ltd.[6]; *Finch* v. *Telegraph Construction and Maintenance Co. Ltd.*[7]; *Nolan* v. *Dental Manufacturing Co. Ltd.*[8]; *England* v. *National Coal Board*[9]; *Bonnington Castings Ltd.* v. *Wardlaw*[10]; *A. L. Underwood Ltd.* v. *Bank of Liverpool*[11]; *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[12]; *Bolton* v. *Stone*[13]; *Drummond* v. *British Building Cleaners Ltd.*[14]; *Norris* v. *Syndic Manufacturing Co.*[15]; *Farquhar* v. *Chance Brothers Ltd.*[16]; *Cooper* v. *K. L. Steelfounders & Engineers Ltd.*[17]; and *Smith* v. *Charles Baker & Sons.*[18]

The only other cases cited in argument were: *General Cleaning Contractors Ltd.* v. *Christmas*[19]; *Clifford* v. *Charles H. Challen & Son Ltd.*[20]; *Woods* v. *Durable Suites Ltd.*[21]; and *Roberts* v. *Dorman Long & Co. Ltd.*[22]

Their Lordships took time for consideration.

March 25. Lord Radcliffe. My Lords, I have had the opportunity of reading in advance the opinion that is about to be delivered by my noble and learned friend, Lord Keith of Avonholm. I agree with his conclusions and with the reasons which he gives for arriving at them.

I do not think that I need say more therefore than that I think that the appeal must be allowed. I am satisfied that the careful judgment of the learned county court judge is vitiated by the fact that he treated the law as compelling him to attribute a breach of duty to the appellants solely because they had not urged or instructed the respondent to wear protective spats while engaged in the work of moulding. Had he not believed himself to be under this legal compulsion he would, as he says, have found that there was no negligence on the part of the appellants. In my opinion the law cannot be expressed in any such absolute or simplied form as he supposed.

There are only two words of caution which I would add to what will be said by others of your Lordships. One is that, though indeed there may be cases in which an employer does not discharge his duty of care towards his workmen merely by providing an article of safety equipment, the courts should be circumspect in filling out that duty with the much vaguer obligation of

[6] [1955] 1 W.L.R. 659; [1955] 2 All E.R. 12.
[7] (1949) 65 T.L.R. 153; [1949] 1 All E.R. 452.
[8] [1958] 1 W.L.R. 936; [1958] 2 All E.R. 449.
[9] [1953] 1 Q.B. 724; [1953] 2 W.L.R. 1059; [1953] 1 All E.R. 1194.
[10] [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615.
[11] [1924] 1 K.B. 775; 40 T.L.R. 302.
[12] [1956] A.C. 552; [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.
[13] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.
[14] [1954] 1 W.L.R. 1434; [1954] 3 All E.R. 507.
[15] [1952] 2 Q.B. 135; [1952] 1 T.L.R. 858; [1952] 1 All E.R. 935.
[16] [1951] 2 T.L.R. 666.
[17] (1951) Unrep., April 12 (Lynskey J.).
[18] [1891] A.C. 325; 7 T.L.R. 697.
[19] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.
[20] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.
[21] [1953] 1 W.L.R. 857; [1953] 2 All E.R. 351.
[22] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.

encouraging, exhorting or instructing workmen or a particular workman to make regular use of what is provided. Properly to measure that obligation as a legal duty requires a fuller knowledge of the circumstances of the factory and of the relations between employers and workmen and their representatives than was available at any rate in the present case. Particularly would that be so, I think, when, as here, there had only just come into force an enactment, the Iron and Steel Foundries Regulations, 1953, which, though containing a regulation expressly devoted to the subject of "protective equipment," included no reference at all to the provision or use of protective spats.

The second point is that, however much attention is concentrated in these cases upon the adequacy of the system of working at the place of work, actions of negligence are concerned with the duty of care as between a particular employer and a particular workman. An experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition. Here, no doubt, the question of delimiting the duty merges with the question of causation.

I would allow the appeal.

LORD COHEN. My Lords, I have had the opportunity of reading in print the speeches which will shortly be delivered by my noble and learned friends, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning. I respectfully agree with the observations they make as to the proper use of authorities in cases such as the present, and I cannot usefully add anything to what they say on that subject. I have, however, the misfortune to differ from them as to the proper application of those principles to the present case. Since this is really a question of fact, and I find myself in complete agreement with what was said thereon in the Court of Appeal by the Master of the Rolls and Parker L.J., I do not think I can usefully add anything to the reasons they give for their conclusion. I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this case comes to your Lordships' House on appeal from a judgment of the Court of Appeal (Lord Evershed M.R., Parker L.J., as he then was, and Sellers L.J.), affirming a judgment of the county court judge, His Honour Judge Norris.

The facts of the case are simple and can be shortly stated. The respondent, whom I shall call the plaintiff, is a moulder, some 38 years of age, and has been a moulder all his working life. He had been employed as such by the appellants for some 12 or 13 weeks, at their foundry at Wolverhampton, when the accident which gave rise to this action happened, on September 16, 1954. As found by the learned county court judge, the plaintiff was casting at the moulding boxes, when the ladle of molten metal

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which he was holding slipped and some of the metal splashed on to his left foot causing him some injury from which, after a few months' disability, he has entirely recovered. This, it may be observed, is not the case that was made by the plaintiff, but it is the way in which the learned judge has held that the accident happened and he found himself able to deal with the case on that footing. The plaintiff's case was that he was carrying a ladle of molten metal along a gangway in the foundry when he stumbled over an obstacle whereby the metal splashed over his foot. The learned judge disbelieved this account of the accident and much of the plaintiff's case founded on alleged breach of section 26 of the Factories Act and certain regulations of the Iron and Steel Foundries Regulations, 1953, accordingly disappeared. The case came to centre on two alleged grounds of negligence, that the appellants (1) failed to provide any or any proper spats or other sufficient protective clothing; and (2) failed to provide a safe system of work and proper plant and equipment. These resolved themselves in the end into the question of the duty of the employers to provide the plaintiff with protective clothing.

The course which the case took in the county court may account for an absence of evidence with regard to the practice of wearing spats or other protective clothing in foundries generally and to a concentration on the plaintiff's own practice in the matter of wearing spats. It only remains to notice, before parting from these preliminary matters, that the appellants, as well as denying the allegations that they were negligent, took the defence that, in any event, the accident resulted from the plaintiff's own negligence. In the result the county court judge apportioned three-quarters of the negligence causing the accident to the plaintiff and one-quarter to the appellants. The Court of Appeal affirmed this judgment. No cross-appeal has been taken to this House by the plaintiff.

The material facts on which the case turns are contained in a short passage in the judgment of the learned judge which, in my opinion, is fully supported by the evidence. I quote the passage in full: "Now when the accident happened the plaintiff was "wearing ordinary boots with a leather tongue inside, part of "which was sewn up to some distance, but they were ordinary "boots. I find that there were spats in the stores which could "be had for the asking, and that there were also strong boots in "the stores which could be had on payment. The plaintiff was "not ordered or advised by the defendants to wear protective "clothing, and I think that was because he was an experienced "moulder. The foreman, who gave evidence, Kenneth Charles "Bloor, stated that had the plaintiff been a learner he would "have advised him about wearing protective clothing, but as he "was an experienced man he considered that he did not need any "warning; he knew and appreciated the risks of the metal "splashing attaching to his work. I believe that if he had

"wanted spats he could have had them for the asking. I think "he knew of all the risks involved and quite voluntarily decided "to wear the boots which he was wearing, and I believe that "since the accident and since his return to work as a moulder he "has not worn any protective clothing. Since the accident he "has done as he did before." He returns to the matter later when he says: "In the present case, the spats and boots were "there and the plaintiff knew they were there, but he was never "told that they must be worn. He decided the matter himself."

On this view of the facts the learned judge expressed himself as follows: "Now, if I were not bound by authority I should "decide that the plaintiff was so experienced that he needed no "warning and that what he did was with the full knowledge of "all the risks involved, and that there was no negligence on the "part of the defendants." It seems clear what he was here saying. The plaintiff "needed no warning," that is against the danger of splashing from molten metal and on the advisability of wearing protective clothing. "What he [the plaintiff] did" was, in the knowledge of the risk, to wear no protective clothing other than his own boots. The learned judge then proceeds: "But I "feel in view of the authorities cited to me that such a decision "would be wrong and I feel compelled to come to a different "conclusion."

My Lords, in my opinion, the learned judge has here misdirected himself. The cases referred to, which I do not find it necessary to examine in detail, differed in material respects from the facts of the present case. In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another. A case may enounce a principle which may be capable of application in other cases, but I know of no principle that in all cases and all circumstances an employer is liable for failing to see that a foundry man is supplied or supplies himself with spats or boots, or at the lowest is "exhorted or pressed with ardour" to avail himself of such protection. It is in this last phrase alone that I can discover in the judge's judgment any principle by which he professes to have guided himself. But these words were used in a very different kind of case, a case of pneumoconiosis where the risk, the nature of the risk, the workman's appreciation of the risk and the consequences of falling a victim to the risk were in an entirely different plane. It is clear to my mind that if the learned judge had not thought, wrongly, in my opinion, that he was bound by the authorities which he cites, he would have found that there was no negligence on the part of the appellants. If he had done so his judgment would, in my opinion, have been unassailable.

The duty owed by the employers was a duty owed to the plaintiff. This is not necessarily the same as the duty owed to others of the workers. The duty may vary with the worker's knowledge and experience. The learned Master of the Rolls and

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Parker L.J. correctly state the duty generally as the duty of an employer to take reasonable care for the safety of his workmen. But in the present case the Master of the Rolls regards the appellants as owing to all their workmen an identical standard of care, and goes on to say[1] that "since, on the judge's finding, the "defendants did nothing at all other than have the gaiters "ready for those that asked, I think they did fall short of their "duty." With all respect to the learned Master of the Rolls this is hardly in accordance with the evidence or with the judge's findings. It is clear on the evidence that the employers did advise inexperienced men to wear spats, and possibly others as well. The Master of the Rolls treats the judge's conclusion as being a conclusion of fact which he is unwilling to disturb. But, in my opinion, as expressed, the judge's conclusion is not a conclusion of fact but a conclusion of law reached on an erroneous assumption that he was bound by a series of inapplicable authorities. Sellers L.J. takes the view, with which I agree, that the plaintiff's attitude, as revealed in his evidence, was that he did not think it necessary to wear spats for his protection and that is why he did not wear them. But he reluctantly feels himself bound to support the learned judge and dismiss the appeal.

As I have already said, the course that the case took in the county court may have prevented sufficient attention being paid to practice in the matter of the wearing of spats or other protective wear in foundries. There is a suggestion in the evidence that the majority of the men in the appellants' foundry disliked wearing spats, and, for all I know, there may be reasons for not wearing spats. It is not insignificant that regulation 8 of the Iron and Steel Foundries Regulations, 1953, while requiring the provision of suitable gloves or other protection for the hands, approved respirators for men working in heavy dust concentrations, and suitable goggles or other eye protection for men working in certain conditions, require no provision of boots, spats or other protective foot or leg equipment. This is in no sense conclusive of the scope of an employer's duty, but it has some evidential value in a case otherwise lacking in evidence of practice in this direction. We listened to some argument on the meaning of the word "provide." Apart from use in statute or statutory regulation, where the word may call for a definite meaning, the word as expressive of a duty can have but an ambulatory connotation. In considering whether there is a common law duty on an employer to provide something, the scope of the obligation must vary with the particular circumstances of the case. This case is but one illustration of the limit of the nature of the provision in relation to the plaintiff on the assumption that there was a duty to provide spats for him. Spats were provided for him in the sense that they were available for him if he wished to use them and he knew they were available. He decided for

[1] [1958] 1 W.L.R. 225, 230; [1958] 1 All E.R. 441.

himself that he did not wish to use them. In the circumstances of this case I cannot hold that the employers had a further duty to bring pressure to bear on him to use them, a pressure which, on the evidence, he would have ignored and might have resented. The spats being available, there was, in my opinion, no failure of duty on the part of the employers to provide spats for this workman.

A separate argument was advanced for the appellants on the point of causation. The two questions to some extent run into one another. If, as I think, there was no negligence here on the part of the appellants in relation to the plaintiff, there could be no negligence causing the accident. I find it unnecessary to consider causation on the opposite assumption.

I would allow the appeal.

LORD SOMERVELL OF HARROW. My Lords, I also would allow the appeal. In the present case the county court judge, after having found the facts, had to decide whether there was, in relation to this plaintiff, a failure by the defendants to take reasonable care for his safety. It is, I think, clear from the passage cited by my noble and learned friend that he would have found for the defendants but for some principle laid down, as he thought, by the authorities, to which he referred.

I hope it may be worth while to make one or two general observations on the effect on the precedent system of the virtual abolition of juries in negligence actions. Whether a duty of reasonable care is owed by A to B is a question of law. In a special relationship such as that of employer to employee the law may go further and define the heads and scope of the duty. There are cases in your Lordships' House which have covered this ground, I would have thought by now, exhaustively (*Wilson's and Clyde Coal Co. Ltd.* v. *English*[2]; *Latimer* v. *A.E.C. Ltd.*[3]; *General Cleaning Contractors Ltd.* v. *Christmas*[4]; and there are, of course, others). There would seem to be little if anything that can be added to the law. Its application in borderline cases may, of course, still come before appellate tribunals. When negligence cases were tried with juries the judge would direct them as to the law as above. The question whether on these facts in that particular case there was or was not a failure to take reasonable care was a question for the jury. There was not, and could not be, complete uniformity of standard. One jury would attribute to the reasonable man a greater degree of prescience than would another. The jury's decision did not become part of our law citable as a precedent. In those days it would only be in very exceptional circumstances that a judge's direction would be reported or be citable. So far as the law is concerned

[2] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.
[3] [1953] A.C. 643; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.
[4] [1953] A.C. 180; [1953] 2 W.L.R. 6; [1952] 2 All E.R. 1110.

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they would all be the same. Now that negligence cases are mostly tried without juries, the distinction between the functions of judge and jury is blurred. A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as "law" and citable, the precedent system will die from a surfeit of authorities. In *Woods* v. *Durable Suites Ltd.*[5] counsel for the plaintiff was seeking to rely on a previous decision in a negligence action. Singleton L.J. said this[6]: "That was a case of the same nature as that "which is now under appeal. It is of the greatest importance "that it should be borne in mind that though the nature of the "illness and the nature of the work are the same, the facts "were quite different. Mr. Doughty claims that the decision of "this court in *Clifford* v. *Charles H. Challen & Son Ltd.*[7] lays "down a standard to be adopted in a case of this nature. In "other words, he seeks to treat that decision as deciding a "question of law rather than as being a decision on the facts "of that particular case."

In the present case, and I am not citicising him, the learned county court judge felt himself bound by certain observations in different cases which were not, I think, probably intended by the learned judges to enunciate any new principles or gloss on the familiar standard of reasonable care. It must be a question on the evidence in each case whether, assuming a duty to provide some safety equipment, there is a duty to advise everyone, whether experienced or inexperienced, as to its use.

Whether or not the learned judge was misled by authorities, there remains the question whether the defendants failed in their duty in not advising or seeking to educate the plaintiff in the use of spats. The point on which the plaintiff succeeded was not pleaded. The plaintiff's main case was that a gangway was obstructed. He was not believed on that. He alleged a failure to provide spats. They were provided, as the judge found, to the plaintiff's knowledge. If the plaintiff had alleged in his particulars of negligence a failure to advise him or educate him in their use it may well be that this would have been gone into more fully in the examination and cross-examination of the witnesses. The point not having been pleaded, it would be wrong to draw inferences adverse to the defendants which might well have been answered in evidence if the point had been pleaded. Lord Parker, for example, assumed that the plaintiff was not told when he entered the defendants' employment that spats were available. This would suggest that there was no general practice in other foundries of providing spats, or the plaintiff would have

[5] [1953] 1 W.L.R. 857; [1953] 2 All E.R. 391.
[6] [1953] 1 W.L.R. 857, 860.
[7] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

assumed their provision. This would be a point in the defendants' favour. It may have been obvious at once from the number of men wearing spats, as stated by Mr. Darby, that spats were there for the asking. I would like to suggest that when a point not pleaded is allowed to be taken in the Court of Appeal, an amendment should be drafted whether or not the case seems likely to reach this House. To see the allegation in terms often assists.

I have come to the conclusion that the learned judge's first impulse was the right conclusion on the facts as he found them, and for the reasons which he gives. I will not elaborate these reasons or someone might cite my observations as part of the law of negligence.

LORD DENNING. My Lords, in 1944 du Parcq L.J. gave a warning which is worth repeating today: "There is danger, "particularly in these days when few cases are tried with juries, "of exalting to the status of propositions of law what really are "particular applications to special facts of propositions of ordinary "good sense"; see *Easson* v. *London & North Eastern Railway Co.*[8]

In the present case the only proposition of law that was relevant was the well-known proposition—with its three-fold sub-division—that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact—be it judge or jury—can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law.

Applying this to the present case: You start with the fact that, when a moulder in an iron foundry carries a ladle full of hot molten metal and pours it into the moulding box, there is a danger that the hot metal may splash over onto his feet. In order to safeguard him from injury, the employers ought, I should have thought, to provide protective footwear for him. But in saying so, I speak as a juryman, for it is not a proposition of law at all, only a proposition of good sense. If the employers fail to provide protective footwear, the tribunal of fact can take it into account in deciding whether the employers took reasonable care for the safety of their men: and it was so taken

[8] [1944] K.B. 421, 426; 60 T.L.R. 280; [1944] 2 All E.R. 425.

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into account by Gerrard J.,[9] Gorman J.[10] and Stable J.[11] in the three cases of which transcripts were provided. In each case the employers were held at fault.

But the question here is not whether the employers ought to provide protective footwear for the men—for they clearly did so. The question is whether, having provided spats and boots, they ought to go further and *urge* the men to wear them. Here too I should have thought that the employers ought to advise and encourage the men to wear protective footwear. But again I speak as a juryman and not as a judge: because it is not a proposition of law at all, but a proposition of good sense. And that is the very point where the county court judge fell into error. He treated it as matter of strict law. He thought that, as this man "was never told that they must be worn," he was *bound by authority* to find that the employers were negligent. He treated it almost as on a par with a statutory regulation: whereas it was nothing of the kind. The distinction was taken by Lord Wright twenty-five years ago: "Whereas at the ordinary "law the standard of duty must be fixed by the verdict of a "jury, the statutory duty is conclusively fixed by the statute"; see *Lochgelly Iron & Coal Co. Ltd.* v. *McMullen.*[12] So here, this being a case governed by the common law and not by any statute or regulation, the standard of care must be fixed by the judge as if he were a jury, without being rigidly bound by authorities. What is "a proper system of work" is a matter for evidence, not for law books. It changes as the conditions of work change. The standard goes up as men become wiser. It does not stand still as the law sometimes does.

I can well see how it came about that the county court judge made this mistake. He was presented with a number of cases in which judges of the High Court had given reasons for coming to their conclusions of fact. And those reasons seemed to him to be so expressed as to be rulings in point of law: whereas they were in truth nothing more than propositions of good sense. This is not the first time this sort of thing has happened. Take accidents on the road. I remember well that in several cases Scrutton L.J. said that "if a person rides in the dark he must "ride at such a pace that he can pull up within the limits of "his vision" (*Baker* v. *E. Longhurst & Sons Ltd.*[13]). That was treated as a proposition of law until the Court of Appeal firmly ruled that it was not (*Tidy* v. *Battman*[14]; *Morris* v. *Luton Corporation*[15]). So also with accidents in factories. I myself once said that an employer must, by his foreman, "do his best to

[9] *Bilsbury* v. *Harrison McGregor & Guest Ltd.* (1955) Unrep., January 18 (Manchester Assizes).

[10] *Brooker* v. *Jenkins Brothers Proprietors Ocean S.S. Co. Ltd.* (1956) Unrep., February 20 (Liverpool Assizes).

[11] *Wood* v. *Smith Bingley & Evans Ltd.* (1956) Unrep., December 18 (Birmingham Assizes).

[12] [1934] A.C. 1; 49 T.L.R. 566.

[13] [1933] 2 K.B. 461, 468.

[14] [1934] 1 K.B. 319.

[15] [1946] K.B. 114; 62 T.L.R. 145; [1946] 1 All E.R. 1.

"keep [the men] up to the mark" (*Clifford* v. *Charles H. Challen & Son Ltd.*[16]). Someone shortly afterwards sought to treat me as having laid down a new proposition of law, but the Court of Appeal, I am glad to say, corrected the error (*Woods* v. *Durable Suites Ltd.*[17]). Such cases all serve to bear out the warning which has been given in this House before. "We ought "to beware of allowing tests or guides which have been suggested "by the judges in one set of circumstances, or in one class of "cases, to be applied in other surroundings," and thus by degrees to turn that which is at bottom a question of fact into a proposition of law. That is what happened in the cases under the Workmen's Compensation Act, and it led to a "wagon-load of "cases"; see *Harris* v. *Associated Portland Cement Manufacturers Ltd.*[18] by Lord Atkin. Let not the same thing happen to the common law, lest we be crushed under the weight of our own reports.

Seeing, then, that the county court judge fell into error, what should the Court of Appeal have done? The answer seems to me this: the Court of Appeal should have done as the judge would have done if he had not felt bound by authority. He would have found that the employers had not been guilty of negligence. True it is that, by the time the case reached the Court of Appeal, the primary facts were all ascertained, and the only issue was what was the proper conclusion from those facts. So the court was right to review it, but still it should give proper weight to the judge's view. Since the case of *Benmax* v. *Austin Motor Co. Ltd.*[19] the Court of Appeal no longer takes refuge in that most unsatisfactory formula: "Al-"though we should not have come to the same conclusion "ourselves, we do not think we can interfere." If the Court of Appeal would not have come to the same conclusion themselves, it does what the Court of Appeal ought to do—what it is there for—it overrules the decision. But short of that, it should accept the conclusions of fact of the tribunal of fact. In this case I would not myself be prepared to differ from the judge's view that there was no negligence on the part of the employers in regard to this particular workman. He knew all there was to know, without being told; and he voluntarily decided to wear his own boots, which he had bought for the purpose.

Only one word more. It is on causation. Even if it had been the duty of the employers to urge this workman to wear spats, I do not think their omission should be taken to be one of the causes of the accident. It is often said that a person who omits to do his duty "cannot be heard to say" that it would have made no difference even if he had done it: see *Roberts* v. *Dorman Long & Co. Ltd.*[20] But this is an over-

[16] [1951] 1 K.B. 495.
[17] [1953] 1 W.L.R. 857.
[18] [1938] A.C. 71, 78; 55 T.L.R. 302; [1938] 4 All E.R. 831.
[19] [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.
[20] [1953] 1 W.L.R. 942, 946; [1953] 2 All E.R. 428.

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statement. The judge *may* infer the omission to be a cause, but he is not bound to do so. If, at the end of the day, he thinks that, whether the duty was omitted or fulfilled, the result would have been the same, he is at liberty to say so. So here, this workman, after he recovered from the injury, went back to work and did the same as before. He never wore spats. If the warning given by the accident made no difference, we may safely infer that no advice beforehand would have had any effect.

I would allow the appeal.

Appeal allowed.

Solicitors: *Berrymans; W. H. Thompson.*

F. C.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1958
Dec. 2.
Lord Parker C.J., Cassels and Barry JJ.

REGINA *v.* CHANDOR.

Criminal Law—Evidence—Child, by—Indecent assaults on children—Schoolmaster accused of offences against three boys—Denial that incidents ever took place—Evidence of succession of incidents given by other boys—Whether relevant.

Criminal Law—Evidence—System.

A schoolmaster was convicted of five offences of indecent assault against three of his pupils, the offences being alleged to have taken place over a period of two years. The defence was a complete denial that the alleged incidents had ever occurred. There was no corroboration and the recorder directed the jury that evidence of a succession of incidents might help them to determine the truth of the matter, provided that they were satisfied that there was no collaboration between the children to put up a false story, and that in considering the evidence of one boy (as to assaults on him) they were entitled to take into account the evidence of the others as to incidents in which they had been involved. He also directed that where the defence amounted to innocent association the evidence of one boy as to an assault on him could be supported by that of another. On appeal against conviction on the ground of misdirection:—

Held, that evidence of a succession of incidents, although it might properly be admissible to help to determine the truth of any incident, for example, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association, had no relevance to determine whether a particular meeting or occasion for an incident ever took place; accordingly, the recorder had misdirected the jury and the convictions must be quashed.

Observations of the Court of Criminal Appeal in *Reg.* v. *Campbell* [1956] 2 Q.B. 432, 439; [1956] 3 W.L.R. 219; 40 Cr.App.R. 95; [1956] 2 All E.R. 272 explained.

Appeal against conviction.

The appellant, Kenneth Francis Chandor, aged 29, a schoolmaster at a boys' secondary school and a man of excellent

character, was convicted at Croydon Borough Quarter Sessions on October 18, 1958, on five counts of an indictment charging him with indecent assault on male persons under the age of 16. He was sentenced to six months' imprisonment on each count to run concurrently. The alleged offences concerned three different boys, aged between 13 and 15, and were alleged to have been committed by the appellant at various dates between May, 1956, and June, 1958, in different parts of the country, namely, at Caterham, Croydon, and in the Lake District. The appellant's case was that none of the alleged incidents had ever occurred and that they were products of the boys' imaginations. There was no corroboration of any of the alleged incidents and the recorder (Mr. R. M. Wilson Q.C.) gave the proper warning to the jury on that matter. In the course of his summing-up he directed the jury that where there was evidence of a succession of cases it might help them to determine the truth of the matter provided that they were satisfied that there was no collaboration between the boys to put up a false story, and that, in considering the evidence of one of the boys (Edwards) they were entitled to take into account what the other two boys had said. He also directed that in any case where the real defence was that there was a perfectly innocent meeting with a boy the evidence of other boys could be taken into account to rebut the defence of innocent behaviour. The relevant passages of the summing-up are fully set out in the judgment.

The appellant appealed against conviction on the ground of misdirection by the recorder.

Neil McKinnon Q.C. and *Daniel Hollis* for the appellant.

J. L. E. MacManus for the Crown.

The cases cited in argument are referred to in the judgment.

LORD PARKER C.J. stated the facts and continued: The appellant's defence from the outset and at the trial was that the alleged incidents never took place at all, and that the boys' stories were merely products of their imaginations. It is clear, therefore, that a most careful direction was needed as to the admissibility of evidence of other incidents in determining the truth of any one incident.

In the course of his summing-up the recorder pointed out that there was, as indeed was right, no corroboration at all in this case and he gave the jury the usual warning. He then went on to say: "Where there is a series of these incidents deposed to by "witnesses of this kind, where you are told that a succession of "these incidents happened, it may help you to determine the "truth of the matter, provided that you are satisfied that there "is no collaboration between the children to put up a false story. "That is what the Court of Criminal Appeal has laid down in

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"1956[1] as a proper direction to give to a jury. You are entitled "to take into account what Smith and Whibley have said in "considering the evidence of Edwards, not as corroboration of "what Edwards has said, because if there are a series of these "incidents you may probably take the fact that there have been "other incidents deposed to to help you to dispose satisfactorily "of the issue, provided you are satisfied there has not been any "collaboration between the children to put up a false story." A little later on he said: "I should also tell you there is another "phase of the present case which you are entitled to take into "account in dealing with any one incident; for example, in one "of the assaults deposed to by Edwards you are entitled to take "the evidence of the other witnesses into account, and that is in "relation to any case where it can be said that the real defence "was not 'I was not there; I never was anywhere near the place,' "but that this was a perfectly innocent meeting with the boy; "you are entitled to take that into account to see whether that "rebuts the defence of innocent behaviour."

Those two passages in the summing-up were undoubtedly based on a passage in the judgment of this court in *Reg.* v. *Campbell*.[1] That case dealt only with questions of corroboration, but at the end of the judgment Lord Goddard C.J. added this[2]: "As we are endeavouring in this judgment to deal comprehen-"sively with the evidence of children, we may perhaps endeavour "to give some guidance to courts who have from time to time "to deal with cases of sexual assaults on children where the "evidence of each child deals only with the assault on himself "or herself. In such cases it is right to tell a jury that because "A says that the accused assaulted him, it is no corroboration "of his evidence that B says that he was also the victim of a "similar assault though both say it on oath. At the same time, "we think a jury may be told that a succession of these cases "may help them to determine the truth of the matter provided "that they are satisfied there is no collaboration between the "children to put up a false story. And if the defence is one of "innocent association by the accused with the children, *Rex* v. "*Sims*,[3] subsequently approved on this point by the House of "Lords in *Harris* v. *Director of Public Prosecutions*,[4] shows "that such evidence can be given to rebut the defence."

The first part of that passage, before the reference to a defence of innocent association, is in very general terms. Unqualified it would appear to cover a case where the accused was saying that the occasion for the incident in question never took place at all. To take an incident in the present case, the appellant said that in

[1] *Reg.* v. *Campbell* [1956] 2 Q.B. 432; [1956] 3 W.L.R. 219; 40 Cr.App.R. 95; [1956] 2 All E.R. 272.

[2] [1956] 2 Q.B. 432, 438.

[3] [1946] K.B. 531; 62 T.L.R. 431; 31 Cr.App.R. 158; [1946] 1 All E.R. 697.

[4] [1952] A.C. 694; [1952] 1 T.L.R. 1075; 36 Cr.App.R. 39; [1952] 1 All E.R. 1044.

respect of an alleged offence with one of the boys—I think it was Edwards at View Point in the Lake District—he, the appellant, had never met the boy at View Point at all. Yet, if this passage in *Reg.* v. *Campbell* [5] is unqualified, it would apply to just such a case. We do not think that the passage in *Campbell* [5] was ever intended to cover that. Indeed, so far as we know, the authorities have never gone so far as that, nor do we see how they could. Evidence that an offence was committed by the appellant against one boy at Croydon could not be any evidence that he met another boy in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to prove identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular meeting or occasion for an incident ever occurred at all.

That is sufficient to dispose of this case, and it is unnecessary to deal with the second passage in the summing-up in respect of a defence of innocent association. We would only observe that in the case of a schoolmaster and his pupil there may be nothing suspicious in the association which calls for explanation. However, having regard to the view we have taken as to the passage in *Campbell's* case [5] and the summing-up based thereon it is unnecessary to deal with that. It follows that the convictions must be quashed and the appeal allowed.

Convictions quashed.

Solicitors: *Craigen, Wilders & Sorrell, Wood Green; Director of Public Prosecutions.*

E. M. W.

[5] [1956] 2 Q.B. 432, 439.

[COURT OF APPEAL.]

M. & J. S. PROPERTIES LTD. *v.* WHITE.

[Plaint No. O. 3120.]

C. A.
1959
March 17, 18.
Hodson, Sellers and Willmer L.JJ.

Landlord and Tenant — Rent restriction — Release from control — "Premises"—Meaning—Whether right to use garden in common with other tenants constitutes "premises comprised in one of the "tenancies"—Whether tenant moving from controlled ground floor tenancy with use of garden to first floor tenancy with use of garden on new letting after date of coming into force of decontrolling Act protected—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11 (2), *proviso.*

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A tenant of a ground floor flat controlled under the Rent Restriction Acts, 1920–39, enjoyed the right to use the garden of the house in common with the tenant of the first floor flat. On July 13, 1957, seven days after the coming into force of the Rent Act, 1957,[1] the first floor flat became vacant, and the ground floor tenant took over the first floor tenancy by a verbal agreement with the landlords' predecessors at 25s. a week, using the garden in the same manner as the previous first floor tenant.

On January 23, 1958, the landlords served on her notice to quit expiring on February 22, 1958. Later they asked for an order for possession, claiming that as the new tenancy had been created by an agreement coming into operation after the commencement of the Act of 1957 (July 6, 1957), the tenancy had become decontrolled and that, accordingly, they were entitled to possession. The tenant by her defence claimed that she had immediately before July 6, 1957, been a tenant under a controlled tenancy of the ground floor, comprising, inter alia, the use of the garden, and that, as the premises comprised in the new tenancy also included the use of the garden, she was within the protection afforded by the proviso to section 11 (2) of the Act of 1957:—

Held, that the word "premises" in the proviso to section 11 (2) was directed to premises capable of physical occupation and not to an incorporeal right, such as the use in common with other tenants of a garden, which might be added to the tenancy; accordingly, the new tenancy was outside the protection of the Rent Restriction Acts and the landlords were entitled to possession.

Dicta in *Gardiner* v. *Sevenoaks Rural District Council* (1950) 66 T.L.R. (Pt. 1) 1091, 1092; [1950] 2 All E.R. 84, and *Whitley* v. *Stumbles* [1930] A.C. 544, 546; 46 T.L.R. 555 considered.

Appeal from Judge Malcolm Wright, sitting at Willesden County Court.

The landlords of a house consisting of two floors at 308, Chapter Road, N.W.2, claimed possession of the first floor rooms and mesne profits from the tenant, Mary Louise White. By their particulars of claim they stated that the rooms were let to her by their predecessors in title on or about July 13, 1957, on a weekly verbal tenancy at an inclusive rent of 25s. per week; that the tenancy had been duly determined by notice to quit served on January 23, 1958, expiring on February 22, 1958; that the tenancy was one to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, did not apply by virtue of section 11 (2) of the Rent Act, 1957; and, accordingly, that they were entitled to possession of the rooms.

By her defence the tenant said that she would rely on the Rent Act, 1957,[1] and would contend that immediately before

[1] The Rent Act, 1957, s. 11 (2) "The Rent Acts shall not apply to a "tenancy created by a lease or agreement coming into operation at or "after the commencement of this Act, "and the tenant shall not by virtue "of those Acts be entitled to retain "possession as a statutory tenant on "the coming to an end of such a "tenancy: Provided that this sub-"section shall not apply where the "person to whom the tenancy is "granted was immediately before the "granting the tenant under a con-"trolled tenancy and the premises "comprised in one of the tenancies "are the same as, or consist of or "include part of, the premises com-"prised in the other."

July 6, 1957 [the date on which the Rent Act of 1957 came into force] she had been the tenant under a controlled tenancy of the ground floor rooms at 308, Chapter Road, comprising, inter alia, the use of the garden at that address, and that the premises comprised in the tenancy of the first floor rooms let to her by the landlords' predecessors in title about July 13, 1957, also comprised the use of the garden.

At the hearing in the county court, evidence was given which showed that the tenant had as tenant of the ground floor rooms been entitled to use the garden in common with the then tenant of the upstairs rooms. By agreement between the tenants, each cultivated one side of the garden, and they shared the use of the grass in the middle. The tenant of the ground floor also had the use of a water closet in the garden while the upper floor tenant had a water closet in the house itself.

The county court judge in his judgment on November 11, 1958, said that the question for decision turned on what view was to be taken of the fact that under the tenant's ground floor tenancy, which was a controlled tenancy, she had the use of the garden, and that under the tenancy of the first floor she still had the use of the garden. The question was whether it was to be said that by virtue of the fact that under each tenancy she had the right to use the garden the premises comprised in one of the tenancies included part of the premises comprised in the other, such as to bring her within the proviso to section 11 (2) of the Act of 1957.[1] One had to decide the question by looking at the words used in the statute and taking them in their natural and ordinary meaning. What were the "premises" comprised in the "other "letting"? They were the first floor flat with the right to use the garden. It did not seem to him to matter what in law was the precise nature of the right to use the garden, since the premises in each case comprised a use of the garden. A letting only granted a right to use the property let by way of enjoying exclusive possession of it. The fact that the garden must be shared with somebody else did not prevent it from being part of the premises comprised in the tenancy; and if that were right the tenant was protected.

The judge said that he disagreed with the decision of Judge Alun Pugh on March 17, 1958, in *Parperis* v. *Panteli*,[2] in which it had been held that where a tenant who enjoyed a house with a shared water closet moved to other premises in the same building sharing the same water closet, the "other premises" did not comprise part of the premises the tenant used to occupy.

His Honour held accordingly that the tenant was protected under the Rent Restriction Acts in her tenancy of the first floor, and dismissed the claim for possession.

The landlords appealed.

[1] See note on p. 526.

[2] (1958) 108 L.J. 476.

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Samuel W. Magnus for the landlords.
Edward Grayson for the tenant.

The following cases were cited in the course of argument: *Gardiner* v. *Sevenoaks Rural District Council* *; *Whitley* v. *Stumbles* †; *Warren* v. *Austen*.‡

Hodson L.J. stated the facts set out above, read section 11 (2) and the proviso to it, and continued: The question which arises for decision is whether, on the true construction of this Act, the word "premises" is apt to include this right to use the garden.

It is to be observed that the right to use the garden is not part of the tenant's holding in the ordinary sense of the word. It is not even an exclusive right to the garden. It is a right to use the garden in common with the tenant of the other part of the building.

In interpreting the word "premises," I think one has to look at this Act and the setting in which it appears. This Act is called the Rent Act, 1957, and it is part of a series of Acts which have been passed to protect tenants and their tenancies. This is a decontrolling Act, and it gives a measure of relief to landlords. It is easy, I think, to see the mischief against which the proviso was intended to provide. Those familiar with the working of these Acts know that a landlord has, in the past, been able to change the identity of the subject-matter of a letting so as to obtain a new standard rent—in most cases a higher standard rent—for premises which are very little different from the old controlled premises; and the mischief aimed at by this proviso is no doubt that of a landlord who might persuade a tenant to enter into an agreement for tenancy of substantially the same premises as the tenant had occupied before, or perhaps of slightly different premises (smaller in that some part had been taken away, or larger in that some part had been added). It seems to me quite plain that it is on the face of it directed to premises which are capable of physical occupation, and is not directed to an incorporeal right or easement which may be added to the tenancy.

I think that, in construing the word, one can have in mind the history of the word "premises" which was referred to by Lord Goddard C.J. in *Gardiner* v. *Sevenoaks Rural District Council*,[1] where he pointed out that the word "premises" had originally been no more than a reference to what had gone before, but that, in the language of conveyancers who were dealing with parcels of property, the word "premises" came to mean "land or what stands upon land." That, in the

* (1950) 66 T.L.R. (Pt. 1) 1091; [1950] 2 All E.R. 84.
† [1930] A.C. 544; 46 T.L.R. 555.
‡ [1947] 2 All E.R. 185.
[1] (1950) 66 T.L.R. (Pt. 1) 1091, 1092; [1950] 2 All E.R. 84.

language of conveyancers, is what is usually meant by "premises," and is, I think, illustrated by a precedent in Key and Elphinstone (5th ed., p. 998) where a garden—and a garden is what we are considering here—was referred to separately from "the premises hereby demised." The same point was made by the House of Lords in *Whitley* v. *Stumbles*,[2] where the only speech was that of Lord Hailsham. Lord Hailsham there was considering an incorporeal right—the right of fishing—and the question was whether, "where an incorporeal right, such as a "right of fishing, is demised along with corporeal hereditaments "by the same lease, and the lessee uses both for the purpose "of his trade or business, the incorporeal right is part of the "'premises' within section 5 of the Landlord and Tenant Act, "1927." The House was considering section 17 of the Landlord and Tenant Act, 1927, which contained this definition: "The "holdings to which this Part of this Act applies are any premises "held under a lease, other than a mining lease, made whether "before or after the commencement of this Act, and used wholly "or partly for carrying on thereat any trade or business, and "not being agricultural holdings within the meaning of the "Agricultural Holdings Act, 1923." Lord Hailsham discussed the meaning of the word "premises," pointing out that it was conceded that[3] "in strict conveyancing language, the word "'premises' is used as meaning the subject-matter of the haben-"dum in a lease." But it was also pointed out that it must include, or must be capable of including, things like easements, and, in the particular case under consideration, a wide construction was given to the word "premises" to cover the fishing rights in question there. Lord Hailsham said[3]: "Any other "construction would, it seems to me, defeat the plain purpose "of the Act, which obviously was to provide that in the circum-"stances defined in the Act the tenant should have a right to "continue to carry on his trade or business in the premises in "the legal sense in which he was carrying them on under the "lease for which he seeks that renewal."

I think one gains assistance here from considering the purpose, not only of this particular Act, but of the whole of the Rent Acts, which is to protect tenants in their physical occupation of premises rather than to protect such subsidiary rights as may be attached to those premises.

It appears to me that in this case the position really was that the tenant of the ground floor flat and the tenant of the first floor flat had and have a right to use the garden which is in the nature of a licence. I respectfully agree with what was said in another case in the county court, *Parperis* v. *Panteli*,[4] by Judge Pugh, which had to deal with a consideration of this Act where a new tenancy began in August, 1957, that is to say, after the date of the coming into operation of the Rent Act,

[2] [1930] A.C. 544; 46 T.L.R. 555.
[3] [1930] A.C. 544, 546, 547.
[4] (1958) 108 L.J. 476.

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1957. There the tenant had the right to share a water closet in the same way as, in this case, the tenant has the right to use the garden. The judge was of opinion—and I agree with him—that the situation was that the use of the water closet was no more than a licence, and that the proviso did not apply. For myself, I think that to hold otherwise would or might lead to very absurd results, because, in cases where a building, even a relatively small building, is split up into parts which are commonly called flats—though I suppose where they are not self-contained they are not strictly flats—it is a common enough thing for the occupants of the different parts of the building to have rights of access, rights of communication between various parts of the building, rights to deposit dust-bins, rights to use telephones, and matters of that kind, which are, on the face of it, not to be supposed to be the subject-matter of this proviso. I, for my part, would on that ground allow this appeal.

A second point was taken by the landlords. It was said that, once the tenant had moved upstairs into the first floor flat, the right to use the garden was not the same right as she had when she was occupying the place below. That seems to me a point which is rather over-subtle, and should perhaps for that reason alone be rejected. I think that substantially it is the same right—the right to use the garden—although it is true that it attaches to different premises when the tenant moves upstairs.

However, I rest my judgment on the first ground advanced by Mr. Magnus, on which he mainly relies, and say that the proviso does not apply because the right to use the garden is not "part of the premises" on the true construction of this Act of Parliament.

Sellers L.J. I agree with my Lord's interpretation of the proviso and the application of it to the facts of this case. The question which arises is whether the premises which the tenant now occupies include part of the premises which she previously occupied. The only evidence adduced to establish that is that when she entered into her tenancy of the previous premises—the ground floor flat—she was granted the right to use the garden. A similar right was given apparently to one Lincoln, who occupied the upstairs premises which the tenant has now taken. Nothing more is said about it in substance, I think, than that that was a right given to her. What was its precise extent or legal nature was not really investigated and perhaps has to be derived from those simple facts. What in fact took place was that the two tenants agreed to cultivate one one part and one another part of the garden, and there seems to have been a grass plot in the middle which they could, if they wished, share in common.

My Lord has given an interpretation of the section with which I agree. It is on that slender evidence that the tenant seeks

to make some link of continuity or overlapping between the two premises occupied by her. I think it is quite inadequate to establish that on any reasonable interpretation of this proviso.

My Lord has referred to the other argument which was advanced, which may be highly technical and not very acceptable. But in fact the tenant in the present occupation of the upstairs flat is enjoying no more and no less than the previous occupier of the flat, that is, she is there occupying the same physical premises and enjoying precisely the same right, and in no way has she, in any real sense, continued anything which was part of her previous tenancy. I prefer the judgment of Judge Alun Pugh in the somewhat similar case cited to us. I agree that this appeal should be allowed.

WILLMER L.J. I also agree that this appeal must be allowed, and I venture to add a few words of my own only because we are differing from the judge below.

The judge held that, when the tenant moved upstairs from the ground floor to the first floor, her retention of the right to use the garden was sufficient to bring her within the proviso to section 11 (2) of the Rent Act, 1957. If such an incorporeal right as the right to use the garden in common with the other tenant in this case is to be held to be included in the word "premises" for the purpose of the proviso to this section, I find it difficult to see, in relation to other incorporeal rights which normally go with the occupation of flats such as these, where one is to stop. My Lord [Hodson L.J.] has already drawn attention to other rights that normally go with the occupation of a flat, such as the right to use the passages and entrances and so forth. Are all such incorporeal rights to be included in the word "premises" for the purposes of this section? If so, I venture to think that there will be few cases where a tenant moving from one flat to another flat in the same building will not be able to invoke some incorporeal right which will bring him or her within the proviso. It is in those circumstances that it seems to me that, in order to make sense of the proviso, one must construe the word "premises" in its physical sense, that is to say, as referring to physical premises which are capable of physical occupation. It is perfectly true, as was pointed out by Lord Goddard C.J. in *Gardiner* v. *Sevenoaks Rural District Council*[5] and by Viscount Hailsham in *Whitley* v. *Stumbles*,[6] that "premises" is a word which is wide enough to include not only corporeal hereditaments but also any incorporeal right which is the subject-matter of the habendum in a lease. But it is, I think, important to observe that Viscount Hailsham himself,[7] in the course of his speech to the House of Lords in the latter case, was at pains to draw attention to the fact that, in the very Act which he was then construing, namely, the Landlord and Tenant Act, 1927, the word

[5] 66 T.L.R. (Pt. 1) 1091, 1092.
[6] [1930] A.C. 544, 546–547.
[7] Ibid.

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"premises" was used in different senses in different contexts. For instance, he referred to instances where the Act referred to the "premises" being demolished—a clear use of the word in its physical or colloquial sense. Having Viscount Hailsham's weighty authority for the proposition that "premises" is an ambiguous word which may be used in alternative senses, it seems to me to be perfectly open to us to say that "premises" in the present context must have been intended by Parliament to be understood in its popular or physical sense. Unless this is so, I find it difficult to make sense of the proviso. For these reasons, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *A. A. Seller & Co.; Scott, Winter & Co.*

M. M. H.

[COURT OF APPEAL.]

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UNION NATIONALE DES COOPERATIVES AGRICOLES DE CEREALES *v.* ROBERT CATTERALL & CO. LTD.

[1958 M. No. 1107.]

Arbitration — Award — Enforcement — Foreign award — Unenforceable locally without order of local court—Whether "final"—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 26, 36, 37.

By an agreement in French made in Paris, dated August 31, 1956, the appellants agreed to sell to the respondents a quantity of wheat seed. The agreement contained an arbitration clause, the English translation of which was: "All differences arising out of "the present contract will be judged by the Arbitration Chamber of "Copenhagen which will settle without appeal with the powers of "an amicable arbitrator." Differences having arisen between the parties they were referred pursuant to the arbitration clause to the Copenhagen Chamber of Arbitration. Under the rules regulating the procedure of the arbitration chamber, awards are made by a committee of the chamber. Regulation 14 of the rules provides that: "awards made by the committee . . . shall be final. An award "can only be appealed against to the appeal court attached to the "committee . . . If the presidency decides that the appeal cannot "be made . . . the award made by the judgment and arbitration "committee shall be final. . . ." By an order of October 6, 1958, the committee awarded to the respondents the sum of £183,000. The presidency of the arbitration committee on November 25, 1958, refused the appellants' application for leave to appeal and notified them that the award of October 6, 1958, was final. The award could not be enforced in Denmark without an order of a Danish court. The respondents, by summons under sections 36 and 26 of

the Arbitration Act, 1950,[1] which applies to arbitration awards made in Denmark, applied for leave to enforce that award. The appellants claimed that the award was a foreign award and had not become final in the country in which it was made:—

Held, that on the facts the award had been made in conformity with Danish law, the law governing the arbitration procedure and was a final award in Denmark, the country where it was made, and satisfied the conditions of section 37 (1) (*c*) and (*d*) of the Arbitration Act, 1950. The fact that the award was not directly enforceable in Denmark until a judgment of the Danish courts had been obtained did not prevent the award being a final award within section 37 (1) (*d*) and, accordingly, section 36 (1) applied to it and it was enforceable in the same way as an English award.

In re Boks & Co. and Peters, Rushton & Co. Ltd. [1919] 1 K.B. 491 considered.

Decision of Hinchcliffe J. affirmed.

APPEAL from Hinchcliffe J.

By an agreement in French, dated August 31, 1956, made in Paris between the appellants, Robert Catterall & Co. Ltd., as sellers, and the respondents, the Union Nationale des Cooperatives Agricoles de Cereales, as buyers, the appellants agreed to sell to the respondents a quantity of wheat seed. The agreement contained a provision for arbitration, the English translation of which was as follows: "All differences arising out of the present "contract will be judged by the Arbitration Chamber of Copen-"hagen which will settle without appeal with the powers of an "amicable arbitrator."

Differences having arisen between the parties, they were referred to the committee of the Arbitration Chamber of Copenhagen in accordance with the rules governing arbitrations by that body. By an award of October 6, 1958, the committee found in favour of the respondents and awarded to them approximately £183,000. Rule 14 of the rules governing the procedure of the arbitration chamber provides: "Awards made by the commit-"tee . . . shall be final. An award can only be appealed against "to the appeal court attached to the committee . . . If the "presidency decides that the appeal cannot be made . . . the "award made by the judgment and arbitration committee shall "be final." The rules are more fully stated in the judgment of Lord Evershed M.R.

[1] Arbitration Act, 1950, s. 26: "An award on an arbitration agree-"ment may, by leave of the High "Court or a judge thereof, be enforced "in the same manner as a judgment "or order to the same effect . . ."

S. 36: "(1) A foreign award shall, "subject to the provisions of this Part "of this Act, be enforceable in "England either by action or in the "same manner as the award of an "arbitrator is enforceable by virtue "of section 26 of this Act."

S. 37: "(1) In order that a foreign "award may be enforceable under this "Part of this Act it must have . . . "(*c*) been made in conformity with "the law governing the arbitration "procedure; (*d*) become final in the "country in which it was made; . . ."

S. 39: "For the purposes of this "Part of this Act, an award shall not "be deemed final if any proceedings "for the purpose of contesting the "validity of the award are pending "in the country in which it was "made . . ."

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The appellants applied under that rule for leave to appeal and were notified by letter dated November 25, 1958, signed by the president of the arbitration committee, that their demand for appeal could not be proceeded with, and stating that the award of October 6, 1958, was final.

By this summons the respondents (the applicants to the summons) applied pursuant to sections 36 and 26 of the Arbitration Act, 1950, for leave to enforce the award of October 6, 1958. Denmark being a contracting State for the purpose of the protocol in the First Schedule to the Arbitration Act, 1950, the provisions in Part II of the Act for the enforcement of foreign awards applied.

Hinchcliffe J., affirming the decision of Master Clayton, gave leave to the respondents to enforce the award in the same manner as a judgment or order.

The appellants appealed.

Helenus Milmo for the appellants.
W. P. Grieve for the respondents.

The following cases were referred to in argument which are not mentioned in the judgments: *Hamlyn & Co.* v. *Talisker Distillery* [2]; *W. Naumann* v. *Edward Nathan & Co. Ltd.* [3]

Lord Evershed M.R. By a contract made on August 31, 1956, between the present appellants, as sellers, and the Union Nationale des Cooperatives Agricoles de Cereales, as buyers, provision was made for the sale of certain wheat seeds. The contract contained, according to the English translation, the following provision: "All differences arising out of the present contract "will be judged by the Arbitration Chamber of Copenhagen which "will settle without appeal with the powers of an amicable "arbitrator." The last three words, "an amicable arbitrator," come a little unusually to an English eye, but nothing turns upon what the exact implication of the adjective may be. The words, "without appeal," are, in fact, a translation of the French "en dernier ressort," which might be translated more literally as "in the last resort." That variation of phraseology may have a bearing in regard to one of the points which I will mention presently.

There was a difference arising out of the contract, and the matter, accordingly, went before the tribunal mentioned, the Arbitration Chamber of Copenhagen. That chamber's transactions appear to be regulated by general rules of the most formal character. I need not read many of those rules, but paragraph 14 concerns appeals. In view, however, of the terms of the contract, it is to be observed that this is what one might call an internal appeal within the ambit of the arbitration chamber itself; it is not

[2] [1894] A.C. 202.
[3] (1930) 37 Ll.L.Rep. 249.

a reference to an appeal to the ordinary courts of Denmark or to any outside tribunal. Paragraph 14 opens with the formula: "The awards made by the committee in respect of the soundness "of the goods contracted for shall be final. An award made can "only be appealed against to the appeal court attached to the "committee for which the following rules are applicable." Later, under the same heading, there is this rule: "The appellant shall be "informed of the time within which he must file his appeal in "writing. . . . The presidency of the committee (the president and "the vice-presidents) are to decide whether the conditions pre-"scribed for the appeal exist and whether or not the appeal has "been properly filed in due time. If the presidency decides that "the appeal cannot be made or that it has not been properly filed "in due time, the award made by the judgment and arbitration "committee shall be final. The presidency shall in special cases "decide upon recommendation," which admittedly means, I think, "upon application," "of a party that an award made "cannot be appealed against unless the appellant gives security, "sufficient in the opinion of the presidency, for the amount which "he is liable to pay," etc. The 15th paragraph of the rules, substituting for "abiding by," the words "submitting to" (which, I think, is the sense of it) reads: "By submitting to "the judgment and award made by the committee, the parties "have unconditionally subjected themselves to the committee's "(including the appeal court's) decision both in substance and "in form, and this decision shall not in any way be overruled and "set aside by the law courts," etc.

The difference having come before the arbitration committee of the chamber, an award was made in favour of the respondents, the French company, for a sum which, translated into figures, is said to be £183,000 odd. The date of that award was the beginning of October, 1958. The appellants said they wished to appeal. The presidency, after first stating the view that no appeal lay, ultimately, and after an application in effect by the French buyers, said that they would entertain an appeal on terms of payment into the Danish court, which the appellants were unwilling to accept. The appeal procedure within the arbitration chamber, therefore, went out of the picture. Thereupon, the award of £183,000 odd, on the face of it, being unchallenged, the present application was made under the relevant sections of the Arbitration Act, 1950, for an order to enforce the award.

I should refer to such sections of the Arbitration Act, 1950, as appear to be relevant. I turn first to section 26, which provides generally, but not in reference to foreign awards, that: "An "award on an arbitration agreement may, by leave of the High "Court or a judge thereof, be enforced in the same manner as a "judgment or order to the same effect." The question of foreign awards is covered by Part II of the Act beginning with section 35, and the first subsection of that section enacts what foreign awards are within the scope of that part of the Act. So far as is relevant,

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the present award is brought within the scope of the Act by virtue of the fact that certain protocols and conventions have been made, the terms of which are set out in the schedules to the Act, being dated in 1924 and 1927, and by virtue of those instruments Denmark, France and the United Kingdom, and parties resident in those countries, are, as regards awards, brought within the scope of Part II. Section 36 (1) to my mind is of importance, for it provides: "A foreign award shall, subject to the provisions "of this Part of this Act, be enforceable in England either by "action or in the same manner as the award of an arbitrator is "enforceable by virtue of section 26 of this Act." Expressing it in less precise language perhaps, the effect, I apprehend, of that subsection is that a foreign award, subject to the provisions of this part of the Act and particularly to the provisions of the next section, is put in the same position quoad enforcement as an award of an English arbitrator.

Section 37 contains the conditions for enforcement of foreign awards, and much of the argument in this case turns upon that section. The first subsection is as follows: "In order that a "foreign award may be enforceable under this Part of this Act" —and may I interpose by way of parenthesis, "like an English "award"—"it must have," and then there are various cumulative conditions which must be satisfied, of which I need only refer to (*c*) and (*d*), ". . . it must have (*c*) been made in conformity "with the law governing the arbitration procedure; (*d*) become "final in the country in which it was made." Subsection (2) I can pass over. Subsection (3) provides: "If a party seeking "to resist the enforcement of a foreign award proves that there "is any ground other than the non-existence of the conditions "specified in paragraphs (*a*), (*b*) and (*c*) of subsection (1) of this "section"—and once more I interpose by way of parenthesis to say, but not (*d*)—"the court may, if it thinks fit, either refuse "to enforce the award or adjourn the hearing until after the "expiration of such period as appears to the court to be reason-"ably sufficient to enable that party to take the necessary steps "to have the award annulled by the competent tribunal."

Finally, I briefly refer to section 39: "For the purposes of "this Part of this Act, an award shall not be deemed final if "any proceedings for the purpose of contesting the validity of "the award are pending in the country in which it was made." In the well-known textbook, Russell on Arbitration, 16th ed., p. 360, that section has the rubric "Meaning of 'final award.'" If I may say so, perhaps that is rather an overstatement, because I do not read section 39 as being a definition or as meaning that, in the absence of proceedings for contesting the validity of an award, an award must be final—though it may perhaps be of some weight as indicating that some onus is thrown upon a party against whom an award has been made to challenge it, where it may be challenged, if he desires to contest its effect. But for

the purposes of this appeal I do not myself place reliance upon section 39.

The points taken and put with characteristic force by Mr. Milmo arise under paragraphs (*c*) and (*d*) of section 37 (1), and of those the latter is the more important. I will, therefore, try to dispose quite briefly of the point under paragraph (*c*), which is to the effect that the award fails to have been made, he says, in conformity with the law governing the arbitration procedure. The point is founded upon the narrative which I have given about appeals to the appeal court within the chamber, and it rests upon the language of paragraph 14 of the rules, and particularly the words "The presidency shall in special cases decide . . ." Put interrogatively, Mr. Milmo says: What are special cases, and why should the terms which the presidency here impose be conclusive against me? In my judgment, the short answer to that is that the effect of this provision is that in these cases of appeal the widest discretion is plainly given to the presidency. That fact is emphasised by the preceding sentence, which reads, it will be recalled: "If the presidency decides that the appeal cannot "be made or that it has not been properly filed in due time, the "award made by the judgment and arbitration committee shall "be final." So here I read this part of the paragraph as meaning that it is a matter for the discretion of the presidency to say, according to the circumstances of each particular case, whether in their view they are such, viz., special enough, to require or justify the making of a condition such as the rest of the paragraph envisages. Briefly, therefore, I cannot see that a case has been made to establish failure on the part of this award to have been made in conformity with the law governing the arbitration procedure.

Paragraph (*d*), however, is more formidable, and upon that Mr. Milmo has directed the main part of his argument. In the final analysis the challenge really turns upon the meaning of the word "final." As a prelude to what follows, I bear, of course, in mind the directions which were laid down in *In re Boks & Co. and Peters, Rushton & Co. Ltd.*[1] In this court Swinfen Eady M.R. accepted the practice as stated in Russell on Arbitration, 9th ed., p. 322, and its language is as follows[2]: "'Now that under section 12 of the Arbitration Act, 1889, "'an award may be enforced as a judgment or order, "'although the right to bring an action is not thereby taken "'away, the necessity for an action no longer exists to the same "'extent as formerly; but an action is still the proper mode of "'procedure . . . where the validity of the award or the right to "'proceed upon it is so doubtful that leave to enforce it under "'the above section cannot be obtained.' In my opinion," the Master of the Rolls says, "that is applicable to the present "case, and the validity of the award is so doubtful that leave to

[1] [1919] 1 K.B. 491. [2] Ibid. 497.

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"enforce it in a summary manner ought not to be given." The matter is put perhaps rather more favourably to Mr. Milmo by Scrutton L.J., who said that he accepted the view of the Master of the Rolls, which coincided with his own experience, namely, that the summary method of enforcing awards is only to be used "in reasonably clear cases."[3] I will, therefore, assume that if we are to uphold the view taken by Hinchcliffe J. we must be of opinion that this is a reasonably clear case.

I turn back first to the Act. The contest, which I shall more elaborately state in a moment, turns, as I have already said, upon the question: is this award final? I would, however, observe this, that the question seems to me to depend upon section 37 (1) (*d*). We are not here concerned with what use might be given to the word "final" for other purposes, for example, in certain contexts and in certain places what might be said to be the effect of the convention in the second schedule. It must be borne in mind as a background that, if the conditions are satisfied, a foreign award is to be put in pari materia, so to speak, with an English award. The question, therefore, is: Has it become final, as we understand that phrase, in the country in which it was made? Of course, the question whether it is final in Denmark will depend no doubt upon Danish law, but the Danish law is directed to showing whether it is final as that word is understood in English. On the face of the matter, as I have narrated the facts, it would appear plain enough that, according to the bargain made between these two parties, this award is final. The two contracting parties have said that they would submit their differences to this arbitration chamber, which will settle "en dernier ressort" the matter in dispute. They have by necessary implication submitted to the rules and regulations of the Danish tribunal, one of which, paragraph 14, states that if the presidency decide against an appeal, then the award is final. If the matter, therefore, rested alone on the documents and the bargain as I find it in the documents, it must be final, I would have said, within the section.

But it is necessary to see what the Danish law is, and upon that matter there have been filed certain affidavits. Mr. Heyman made an affidavit for the respondents. His qualifications are not in doubt; he is a qualified Danish lawyer and a barrister of the English Bar. He said in the final paragraph of his affidavit: "According to the aforesaid laws and constitution," which is a reference to the Danish tribunal, "the award of October 6 which "was made in conformity with the law governing the arbitration "procedure is final and binding by virtue of the failure of the "respondent to fulfil the conditions for an appeal laid down by "the said arbitration committee." But then the matter was taken up by an affidavit by Mr. Nikkelsen, who I think represented the appellants in the arbitration proceedings and who is

[3] [1919] 1 K.B. 491, 497.

also a member of the Danish Bar. Paragraph 3 of his affidavit reads thus: "In my opinion under the laws of Denmark the "aforementioned award has not and will not become final unless "and until it is laid before and acknowledged by the Danish "court which to the best of my knowledge, information and "belief"—and he is, I gather, quite correct—"has not been "done." He then refers in support of his opinion to a textbook, Frivillig Voldgift, by Bernt Hjejle. The passage in that textbook is this—being, of course, in translation: "An arbitral award "need not be final because it is valid (but if it has become final, "it must of course always be considered as valid). It will not "be final until no more objections can be raised to it. In "Denmark no time limit is fixed for raising objections to the "validity of an arbitral award, nor are there any principles in law "frustrating objections by prescription or preclusion. Therefore, "any person will have to obtain legal confirmation in Denmark "of his arbitral award made in Denmark before seeking enforce-"ment in a foreign country according to the Geneva Protocol of "the said award."

It will be convenient to complete the evidence by reference to the further affidavit of Mr. Heyman in reply. He says: "According to Danish law one cannot obtain execution of a "Danish arbitration award in Denmark unless a judgment has "been obtained from the court based on the award. At the "hearing of the action"—I agree with Mr. Milmo that obviously means an application or whatever is the appropriate procedure for obtaining a judgment in the Danish court—"the defendant is "however confined to objections of a formal nature, e.g., that the "arbitration tribunal's procedure rules have not been complied "with. The court will not, apart from these formal defects, "rehear the case." He proceeds: "I respectfully agree with "Mr. Thorvald Nikkelsen that unless and until the arbitration "award referred to in paragraph 4 of my previous affidavit has "been before the Danish courts, it would be open to the respon-"dent to complain that the award suffers from formal defects."

At first sight, of course, it might appear that Mr. Heyman is saying that, according to the law of the country in which this award was made, viz., Denmark, the award is not final as that word is used in section 37 (1) (*d*). But I confess I have come myself to the clear conclusion that that is not right. If it were so (as I think it must follow, and there is much force in this point which Mr. Grieve made) it would mean that you could never in fact enforce an award, as such, in such cases as this; you would have to wait until you got the judgment of the court of the country where the award was made, and then you would not be enforcing the award but the judgment. I venture again to refer to the vital fact, as I think, that Part II, and the conditions to be complied with, is intending to put a foreign award in the same condition as an English award. But looking more closely at the evidence, it seems to me that what clearly has arisen here is a

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confusion—I am not using the word, and I certainly do not intend to, in a sense critical of the deponents—between finality as intended by the section and enforceability. Reverting to the textbook writer, I think that is made clear enough. He says that an award once final, of course must be valid, and speaks of an award not necessarily being final because it is valid. Those are somewhat philosophical considerations. He goes on, it will be observed, to speak of the possibility of taking objections, contemplating, as it seems to me, perhaps rather as subsection (3) of section 37 does, a challenge being made by the aggrieved party in the appropriate court of competent jurisdiction. But when he comes to his conclusion, introduced by the word "therefore," it is clear that the textbook writer is concerned with enforcement: "Therefore, any person will have to obtain legal confirmation ". . . before seeking enforcement."

Now the question of enforcement here is a matter of English law. Can it now be enforced by the terms of the Arbitration Act? It seems to me, with all respect to Mr. Milmo's argument, that it is reasonably clear that it can. This award is, to my way of thinking, final according to the bargain made and according to the law of Denmark, so far as it is concerned with the problem with which we are presented. It is no doubt not enforceable directly in Denmark or anywhere else; but it is, I think, final within the contemplation of the section. I would add that there is here, so far as I know, no question of any formal challenge. I agree with Mr. Milmo that when it speaks of formal defects, the language, according to the deponents (and particularly is that shown by Mr. Heyman's own affidavit), is not limited to defects on the face of the award, mere matters of form; it will extend to compliance with the rules under which the award was given. But, as I have already said, there is, so far as I know, no challenge on that basis; indeed, no precise challenge, so far as I know, at all.

The matter is, I think, not one which admits of useful elaboration, and I therefore say no more than this, that I have come to a clear conclusion in my own mind, in conformity with that of the judge, that for the purposes of section 37 (1) (*d*) this award must be treated as having become "final" according to the relevant law of Denmark, and, that being so, the conditions in other respects being satisfied, section 36 (1) applies to it and it is enforceable in the same way as an English award.

I would, therefore, dismiss the appeal.

Pearce L.J. I agree with all that my Lord has said. The question here is whether it is reasonably clear that the award has been made in conformity with the law governing the arbitration procedure and is final in the country in which it was made, namely, Denmark, so as to satisfy section 37 (1) (*c*) and (*d*) of the Arbitration Act, 1950. That depends on a consideration of

the rules and regulations of the Copenhagen Judgment and Arbitration Committee and the affidavits as to Danish law. As to the point that it was not in conformity with the law governing the arbitration procedure, I see no force in it. The rules provide that the presidency shall decide whether an appeal can be made and in special cases shall decide that an award made cannot be appealed against unless security is given by payment of the full amount payable under the award. If it is decided there can be no appeal, then the award is final. I see nothing to show that the presidency was not entitled to make the order that they made in this particular case.

In my view the award has also become final in the English sense of that word. The appellants did not wish to have any adjournment under section 37 (3) so as to entitle them to contest the validity of the award. If it were necessary to recover a Danish judgment before the award becomes final, then that judgment could be enforced, as has been pointed out, quite apart from the provisions of the Arbitration Act, and those provisions would be valueless. It is true that, for the purposes of enforcement, an application has to be made to the Danish courts, but that is not the test here. The test is whether the award is final within the meaning of section 37 (1) (*d*). In my view, for the reasons given by my Lord, it is.

I, therefore, would also dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *P. R. Kimber; Rowe & Maw.*

B. A. B.

[COURT OF APPEAL.]

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Feb. 13, 16, 17, 18; *Mar.* 16.
Jenkins, Romer and Ormerod L.JJ.

In re TAPP.
GONVILLE AND CAIUS COLLEGE, CAMBRIDGE *v.* INLAND REVENUE COMMISSIONERS.

[1958 T. No. 467.]

Revenue—Estate duty—Annuity—Successive annuities—Continuing annuity—Annuity payable to such of three persons as should be living—Death of one annuitant—Property passing—Whether continuing annuity—Duty, how assessed—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2 (1) (*b*), 7 (7).

A testator, who died in 1936, by clause 9 of his will, directed his trustees to pay out of the income of the trust fund representing his residuary estate after the death of his wife (who predeceased him) the sum of £3,000 per annum to "my sister A. my nephew T.

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"and my niece F. or such one or more of them as shall for the time "being be living and if more than one of them shall be living to be "received by them in equal shares."

The sister died in 1937 and her third share of the annuity accrued to the testator's nephew and niece. The nephew died in 1956 and the Estate Duty Office claimed duty on his death under sections 2 (1) (*b*) and 7 (7) (*b*) of the Finance Act, 1894,[1] on the "slice" of the capital of the trust fund producing the £1,500 a year, being the half share of the annuity which had been payable to the deceased nephew. The trustees of the will contended that estate duty was payable under section 1 upon the actuarial value for the life of the niece of the £1,500 a year which accrued to her:—

Held, (1) that on the true construction of the will the annuity given by clause 9 was a continuing annuity of £3,000, and that on the death of the nephew the annuity did not cease but continued to be payable with the difference that the half share, which had been payable to the deceased during his life, became payable to the niece as the last survivor of the three named beneficiaries.

(2) That accepting the principle laid down in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 193; 15 T.L.R. 270, with regard to the respective functions of sections 1 and 2 of the Finance Act, 1894, a continuing annuity payable under a trust out of the income of a fund to two or more persons in succession, or to several persons, and the survivors or survivor of them constituted property capable of passing on the death of each successive taker, other than the last, and that the annuity given by clause 9 passed within the meaning of section 1 and, accordingly, duty was payable on the actuarial value at the death of the deceased of an annuity payable during the residue of the life of the surviving annuitant.

In re Cassel [1927] 2 Ch. 275; 43 T.L.R. 743 and *In re Duke of Norfolk* [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664 followed.

In re Payton [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425 distinguished.

In re Weigall's Trusts [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312 disapproved.

Decision of Danckwerts J. affirmed.

William Munro Tapp (hereinafter called "the testator") by clause 9 of his will dated June 16, 1933, directed his trustees to hold the trust fund, representing his net residuary estate, upon trust out of the income, after the death of his wife (who predeceased him), to pay "the sum of £3,000 per annum to

[1] Finance Act, 1894, s. 1: "In "the case of every person dying "after the commencement of this "part of this Act, there shall . . . be "levied and paid, upon the principal "value . . . of all property . . . "which passes on the death of such "person a duty, called 'Estate "'duty.'"

S. 2 (1): "Property passing on "the death of the deceased shall be "deemed to include . . . (*b*) Property "in which the deceased or any other "person had an interest ceasing on "the death of the deceased, to the "extent to which a benefit accrues "or arises by the cesser of such "interest. . . ."

S. 7 (7): "The value of the bene-"fit accruing or arising from the "cesser of an interest ceasing on "the death of the deceased shall— "(*a*) if the interest extended to the "whole income of the property, be "the principal value of that property; "and (*b*) if the interest extended to "less than the whole income of the "property, be the principal value of "an addition to the property equal "to the income to which the interest "extended."

"my sister Catherine Alway my nephew Arthur Gerard Sentance "Tapp and my niece Phyllis Fawell or such one or more of "them as shall for the time being be living and if more than "one of them shall be living to be received by them in equal "shares" and he gave the balance of the income of the trust fund to the Master & Fellows of Gonville and Caius College in the University of Cambridge.

The testator by a codicil dated September 23, 1935, made in contemplation of his second marriage, confirmed the provisions in his will with regard to the annual payments of £3,000.

The testator died on January 23, 1936. His sister Catherine Alway died on June 29, 1937. On her death estate duty was claimed and paid on the actuarial value of the annual sum of £1,000, being one third of the annuity of £3,000 which on her death accrued to Arthur Gerard Sentance Tapp and Phyllis Fawell. Arthur Gerard Sentance Tapp (hereinafter called "the "deceased") died on July 31, 1956. On his death the Estate Duty Office claimed duty under sections 2 (1) (*b*) and 7 (7) (*b*) of the Finance Act, 1894, on the "slice" of the capital of the trust fund producing £1,500, being the half share of the annuity which had been payable to the deceased during his life.

By this summons the trustees of the testator's will asked whether estate duty became payable on the death of the deceased under section 1 of the Finance Act, 1894, upon the value at that date of a continuing annuity of £1,500 per annum for the remainder of the life of Phyllis Fawell; or under section 2 (1) (*b*) on the capital value of the proportion of the residuary estate required to produce an annuity of £1,500. The defendants to the summons were the Inland Revenue Commissioners and Phyllis Fawell.

Danckwerts J. held that estate duty was payable under section 1 of the Act of 1894 on a one-half share of a continuing annuity of £3,000 for the life of Phyllis Fawell.

The Crown appealed.

Sir Lynn Ungoed-Thomas Q.C. and *E. Blanshard Stamp* for the Crown.

John Pennycuick Q.C. and *R. Cozens-Hardy Horne* for the trustees.

The following cases were referred to in argument which are not mentioned in the judgment: *Lord Advocate* v. *Maclachlan* [2]; *Inland Revenue Commissioners* v. *Crossman* [3]; *In re Parkes' Settlement Trusts.* [4]

Cur. adv. vult.

[2] 1898 S.C. 917.
[3] [1937] A.C. 26; 52 T.L.R. 415; [1936] 1 All E.R. 762.
[4] [1956] 1 W.L.R. 397; [1956] 1 All E.R. 833.

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March 16. Jenkins L.J. read the following judgment of the court.

This is an appeal by the Commissioners of Inland Revenue from a judgment of Danckwerts J. dated July 29, 1958, in proceedings brought against them by the present trustees of the will of William Munro Tapp, deceased, for the determination by the court of a question concerning the estate duty payable on the death of Arthur Gerard Sentance Tapp (hereinafter called "the "deceased") in respect of his interest under a trust contained in the testator's will for the payment out of the income of the trust fund thereby constituted of an annuity of £3,000 to three named beneficiaries, including the deceased (who was the second of the three to die), or such one or more of them as should for the time being be living, and if more than one in equal shares.

The question in the appeal is whether, having regard to the terms of this trust, there was, on the death of the deceased, a passing under section 1 of the Finance Act, 1894, of property, in the shape of the share original and accruing of the annuity to which he was entitled at the time of his death, and which then became payable for life to the last survivor of the three named beneficiaries, to be valued actuarially as at his death; or whether such share constituted an interest ceasing on his death in property in the shape of the trust fund out of the income of which the annuity was payable, so as to give rise to a notional passing under section 2 (1) (*b*) of a "slice" of the capital of the trust fund to be valued in accordance with section 7 (7) (*b*).

The will is dated June 16, 1933. The testator's wife named in the will died in his lifetime. After her death he married again and in contemplation of such re-marriage he made a codicil dated September 23, 1935, by which (so far as material for the present purpose) he confirmed his will. The testator died on January 23, 1936, and his will and codicil were duly proved on May 7, 1936.

The only provisions of the will to which it is necessary to refer for the present purpose are those contained in clause 9. By that clause the testator made a general residuary devise and bequest to his trustees upon trusts for conversion and investment and directed his trustees to hold the resulting investments and the investments from time to time representing the same (thereinafter referred to as his trust fund) upon trust to pay out of the income thereof to his wife Kate Garrett Tapp (who predeceased him) during her life the annual payment therein mentioned "and "out of the remainder of such income to pay the following annual "payments videlicet (a) the sum of £1,500 per annum during "the life of my said wife Kate Garrett Tapp and after her death "the sum of £3,000 per annum to my sister Catherine Alway my "nephew Arthur Gerard Sentance Tapp" (the deceased) "and "my niece Phyllis Fawell or such one or more of them as shall "for the time being be living and if more than one of them shall "be living to be received by them in equal shares."

Catherine Alway died on June 29, 1937, and it is interesting

to note that, in accordance with the official practice then followed, for which support is to be found in *In re Cassel* [1] and *In re Duke of Norfolk* [2] (in the Court of Appeal), estate duty was claimed and paid on her death under section 1 of the Act upon the actuarial value for the lives of the deceased and Phyllis Fawell and the survivor of them of the one-third share (namely, £1,000 per annum) of the annuity of £3,000 which then accrued to the deceased and Phyllis Fawell for their joint lives and the life of the survivor of them under clause 9 of the will.

The deceased died on July 31, 1956, and thereupon the Estate Duty Office, reversing their previous practice on the strength of the decisions in *In re Payton* [3] and *In re Weigall's Will Trusts*,[4] claimed duty on his death under sections 2 (1) (*b*) and 7 (7) (*b*) of the Act on the "slice" of the capital of the trust fund producing the half share (namely, £1,500) of the annuity which had theretofore been payable to the deceased during his life.

The trustees took the view that the less onerous method of assessment, adopted in the case of Catherine Alway, was right, and should be followed in the case of the deceased. The Estate Duty Office, however, maintained their claim under sections 2 (1) (*b*) and 7 (7) (*b*), and the present proceedings ensued.

The trustees, relying upon *In re Cassel* [5] and *In re Duke of Norfolk*,[6] contend that the trust declared by clause 9 of the will created one single and continuing annuity payable out of the income of the trust fund during the period until the death of the last survivor of the three named beneficiaries, and that, on the death of the deceased, there was a passing, within the meaning of section 1 of the Act, of the share (namely, one half) of that continuing annuity to which he was entitled at his death from his beneficial enjoyment to that of Phyllis Fawell. If that view is right, then it is common ground that the estate duty payable on the death of the deceased should be charged under section 1 on the principal value of the property so passing, that is to say, the principal value actuarially ascertained as at the death of the deceased of an annuity of £1,500 per annum for the life of Phyllis Fawell, as the last survivor of the three named beneficiaries.

The Commissioners of Inland Revenue, on the other hand, relying on *Payton* v. *Inland Revenue Commissioners* [7] and *In re Weigall's Will Trusts*,[8] contend that there was in this case no passing of property on the death of the deceased within the meaning of section 1. They make this submission on the ground that, having regard to the terms of this particular trust, the annuity was not for estate duty purposes property at all, but a mere chose in action or collection or series of choses in action which could have no existence as property apart from the beneficial

[1] [1927] 2 Ch. 275; 43 T.L.R. 743.
[2] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.
[3] [1951] Ch. 1081; [1951] 2 T.L.R. 235; [1951] 2 All E.R. 425.
[4] [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312.
[5] [1927] 2 Ch. 275.
[6] [1950] Ch. 467.
[7] [1951] Ch. 1081.
[8] [1956] Ch. 424.

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interests therein. According to this argument, as we understand it, on the death of Catherine Alway her right to receive one third (or £1,000 per annum) of the annuity ceased, and a like proportion of the annuity ceased with her right to receive it, leaving nothing which could pass on her death, because her part of the annuity, and her right to receive it, were in truth one and the same thing. The subsequent division, in accordance with the trust, of the part of the annuity which had been payable to Catherine Alway between the deceased and Phyllis Fawell in equal shares is on this view accounted for as due to a new and distinct right, springing up in them on Catherine Alway's death, to the receipt during their joint lives in equal shares of a yearly sum equal to the yearly sum theretofore payable to Catherine Alway. Similarly, it is claimed that on the death of the deceased his right to receive one half (or £1,500) of the annuity, and with it a like proportion of the annuity, ceased, and a new and distinct right sprang up in Phyllis Fawell to receive during the remainder of her life a yearly sum equal to the yearly sum theretofore payable to the deceased. It follows, in the commissioners' submission, that the relevant provisions of the Act are to be found in sections 2 (1) (*b*) and 7 (7) (*b*). In their submission, the effect of the trust for duty purposes was to confer on the deceased "an interest "ceasing on his death," in the shape of his share original and accruing of the annuity, in "property" in the shape of the trust fund out of the income of which the annuity was payable, and that, accordingly, this property is to be deemed by virtue of section 2 (1) (*b*) to have passed on the death of the deceased "to "the extent to which a benefit accrues or arises by the cesser "of such interest." It is common ground that, if this view is right, the value for duty purposes of the benefit accruing or arising from the cesser of the deceased's interest must under section 7 (7) (*b*) be taken as being "the principal value of an "addition to the property" (that is, the trust fund under the will) "equal to the income to which the interest extended."

By the judgment under appeal the judge made a declaration to the effect that duty was, as contended by the trustees, payable under section 1 of the Act on the value at the death of the deceased of a one-half share in a continuing annuity of £3,000 per annum for the remainder of the life of Phyllis Fawell as the last survivor of the three named beneficiaries.

The judge regarded himself as bound so to hold by the authority of *In re Duke of Norfolk*.[9] The commissioners contend that he ought to have followed *In re Payton*[10] in preference to *In re Duke of Norfolk*,[11] and by doing so to have reached a contrary conclusion.

We should next refer to the four cases already noticed, beginning with *In re Cassel*.[12] In that case a testator bequeathed

[9] [1950] Ch. 467.
[10] [1951] Ch. 1081.
[11] [1950] Ch. 467.
[12] [1927] 2 Ch. 275.

"Brook House and contents" and the stables held therewith, the premises being held on leases expiring in 1995, to trustees for successive tenants for life and directed that "the rents outgoings "rates and taxes for the time being payable in respect of the "premises and keeping the same and the contents thereof insured "against fire and burglary and in a proper state of preservation "should always be paid by my trustees out of the income of my "residuary personal estate." On the death of the first tenant for life, the question arose whether the varying periodical payments falling to be made out of income under the above-stated direction attracted estate duty under section 1 of the Act, on the ground that there was a passing within the meaning of that section of property in the shape of the benefit of the annual sum payable in accordance with the direction above stated, or under section 2 (1) (*b*), on the ground that they constituted for the purposes of that section an interest ceasing on the death of the deceased tenant for life. Russell J. considered himself bound by *Earl Cowley* v. *Inland Revenue Commissioners*,[13] though against his own inclination, that the case before him was one in which there was a passing within the meaning of section 1, with the result that that section must be applied to the exclusion of section 2 (1) (*b*). Having thus reached the conclusion that section 1 was applicable, Russell J. said[14]: "What then is "the property which passes on Mrs. Cassel's death? In my "opinion the true answer is the benefit of the annual sum pay-"able under the special clause. I have already in my previous "judgment indicated the nature of this provision. Its duration "is for a term which must expire in 1995. It may expire earlier "if Brook House is sold; but in view of the benefits conferred "by the special clause this event, though possible, is improbable. "In substance, the trustees are bound for a period of time to "apply an annual sum of varying amount for the benefit of the "person for the time being entitled under the will to the enjoy-"ment of Brook House and contents. What passes is the right "to enjoy the benefit of that annual sum. That is the property "which passed on the death of Mrs. Cassel."

In *In re Duke of Norfolk*[15] there was a devise of freehold hereditaments to the testator's wife, as his sole executor and trustee, for a term of 1,000 years on trust to pay out of the income thereof any annuity or annuities bequeathed by him, followed by a bequest to her as such sole executor and trustee of an annuity of £2,000 to commence from his death and to continue to be payable during the joint lives of two named persons (who were father and son) and the life of the survivor of them, and to be paid to the father during his life and after his death to the son, subject in both cases to certain protective trusts. On the death of the father in the lifetime of the son a question comparable

[13] [1899] A.C. 198; 15 T.L.R. 270.
[14] [1927] 2 Ch. 275, 280.
[15] [1950] Ch. 467.

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to the question now in issue arose in regard to the estate duty payable in respect of this annuity.

It is important to observe that in *In re Duke of Norfolk* [15] it was not in dispute that, on the true construction of the will and codicils in that case, the interest in question was one continuing annuity for the longer of the lives of the two annuitants, and could not be regarded as comprising two successive annuities the first ceasing and the second commencing on the death of the father. It is further to be noted that the argument for the Crown was not to the effect that there was no passing of the annuity within the meaning of section 1 in respect of which duty could be claimed, and consequently that recourse must be had to section 2 (1) (*b*). Admittedly, there was a passing of the annuity under section 1, which on the principles laid down in *Cowley's* case [16] excluded recourse to section 2 (1) (*b*), so far as the annuity itself was concerned. It was, however, argued that it was nevertheless open to the Crown to claim in the alternative that, so far as the property charged with the annuity was concerned, the father's life interest in the annuity was an interest in that property which ceased on his death within the meaning of section 2 (1) (*b*) and, accordingly, brought about a notional passing on the father's death to the extent to which a benefit accrued or arose by the cesser of such interest, thus attracting duty on a "slice" of the capital of the property ascertained as provided in section 7 (7) (*b*). These arguments were rejected by the court as contrary to the principles laid down in *Cowley's* case [16] and also on the ground that the continuing character of the annuity made sections 2 (1) (*b*) and 7 (7) (*b*) wholly inappropriate. There was a further argument to the effect that, even if duty could only be claimed under section 1 as on an actual passing of the annuity on the death of the father, the property which passed was not simply the right to receive the annuity during the residue of the life of the son but the proportion of the corpus of the property charged corresponding to the proportion of the income thereof required to produce the annuity. This argument was likewise rejected, and, in the result, it was held that on the death of the father there was an actual passing of the annuity under section 1 and that the annuity must be valued for duty purposes as consisting of the right to receive £2,000 per annum from the death of the father for the residue of the life of the son.

We have been invited by Sir Lynn Ungoed-Thomas for the commissioners to distinguish *In re Duke of Norfolk* [17] from the present case on the strength of the differences in the terms of the relevant dispositions in the two cases and also to discount its effect as an authority on the ground that it proceeded to a great extent on admissions in regard to matters vital to the question raised in the present case.

[15] [1950] Ch. 467.
[16] [1899] A.C. 198.
[17] [1950] Ch. 467.

We agree that the continuing character of the annuity in *In re Duke of Norfolk* [17] was not disputed, and, having regard to the terms in which it was given, we think it plainly was a continuing annuity.

We also agree that the elaborate argument for the Crown was not based on the contention that there was no passing of the annuity under section 1, but on the contention that, given such a passing, duty could nevertheless be exacted on a "slice" of capital either under section 2 (1) (*b*) or section 7 (7) (*b*) or, by analogy to the case of the cesser by death of a life interest, in an aliquot share of a fund.

Nevertheless we think it was necessary to a proper decision of the case that the court should state the principles governing the liability to duty on the death of a person entitled during his life to a continuing annuity bequeathed for the benefit of several persons in succession. Accordingly, we think we should accept as binding upon us in any comparable case the conclusions expressed by this court in *In re Duke of Norfolk.*[17]

These conclusions were to the effect that *In re Cassel,*[18] if not actually binding upon this court, was right in principle (see *per* Lord Evershed M.R.,[19] *per* Somervell L.J.[20] and *per* Jenkins L.J.[21]), and, accordingly, that where (as in *In re Duke of Norfolk* [22]) a continuing annuity is payable out of the income of a trust fund to two or more persons in succession, there is a passing within the meaning of section 1 of the Finance Act, 1894, on the death of each of the persons so entitled (other than the last to die) of property in the shape of the annuity, the value of which for estate duty purposes is the value as at the death of the person dying of the annuity for the residue of the period for which it is payable.

We do not think there is any material ground of distinction between the annuity in *In re Duke of Norfolk* and the annuity in the present case.

On the true construction of clause 9 of the will in the present case, the annuity is, in our judgment, a continuing annuity. The trust, as we construe it, is to make one continuous annual payment of £3,000 out of the income of the trust fund to the three named beneficiaries or such of them as shall for the time being be living during one entire period, namely, the period until the death of the last survivor of the three named beneficiaries. We see no justification in the language used for splitting the annual payment of £3,000 into, first, three annuities of £1,000 each payable to one of the three named beneficiaries for his or her life; secondly, two fresh annuities of £500 each springing up on the death of the first beneficiary to die and the consequent cesser of such beneficiary's annuity, one of such fresh annuities of £500 being payable to each of the two surviving beneficiaries

[17] [1950] Ch. 467.
[18] [1927] 2 Ch. 275.
[19] [1950] Ch. 467, 475, 477, 478.
[21] Ibid. 484, 485.
[22] Ibid. 467.
[20] Ibid. 481.

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during his or her life; and, thirdly, one fresh annuity of £1,500 springing up on the death of the second beneficiary to die and the consequent cesser of such beneficiary's original and additional annuities of £1,000 and £500, such fresh annuity of £1,500 to be paid to the last surviving beneficiary during his or her life.

We cannot accept the contention urged on behalf of the commissioners to the effect that *In re Duke of Norfolk* is distinguishable from the present case on the strength of two features of the gift in *In re Duke of Norfolk* which have no counterpart here, namely, (a) the devise to the trustee of freehold hereditaments for a term of 1,000 years upon trust to pay out of the income thereof any annuity or annuities bequeathed by the testator; and (b) the gift of the £2,000 annuity to the trustee in trust for the persons successively entitled. The devise of the freehold hereditaments in question for the term of 1,000 years upon trust as aforesaid was no more than a usual conveyancing method of subjecting the income of freeholds to a trust for payment of an annuity or annuities; and the distinction sought to be drawn between a gift out of income of an annuity to a trustee in trust for persons in succession, as in *In re Duke of Norfolk*, and a plain trust to pay an annuity out of the income of a fund to persons in succession, as in the present case, is to our minds for the present purpose a distinction without a difference. More significant, in our view, are the points of similarity between the two cases, namely, (a) that the effect of the gift was to subject the income of the freehold hereditaments in *In re Duke of Norfolk*, and of the trust fund in the present case, to a trust for payment of an annuity to persons in succession; (b) that the annuity given took the form of one continuous annuity or annual payment of the prescribed amount of £2,000 in *In re Duke of Norfolk* and of £3,000 in the present case; and (c) that the duration of the annuity was measured by the life of the survivor of the father and the son in *In re Duke of Norfolk* and by the life of the last survivor of the three named beneficiaries in the present case. We would add that the intermediate gift of the annuity to the trustee in *In re Duke of Norfolk* may well have been due to the circumstance noticed in the report in the All England Reports, though not in the Law Reports, that the interests of the father and the son in the annuity were made subject to certain protective trusts: see the report of the case before Wynn-Parry J.[23]

Accordingly, subject to the effect of *In re Payton*,[24] to which we should next refer, we are of opinion that this case, like *In re Duke of Norfolk*,[25] is a section 1 case, with the result that duty is payable on the property passing, that is the annuity, which must be actuarially valued as at the death of the deceased as an annuity payable during the residue of the life of Phyllis Fawell.

[23] [1949] 2 All E.R. 701.
[24] [1951] Ch. 1081.
[25] [1950] Ch. 467.

In re Payton[26] was concerned with two contractual pensions payable under certain group policies effected by the Austin Motor Co. Ltd. for the purpose of providing pensions for their employees. The scheme of benefits enabled an employee to take, in lieu of a pension for his own life only, a pension payable to himself during his life and thereafter to his wife if she survived him during her life. Payton, the employee concerned, exercised, with respect to each of two pensions to which he was entitled, the option of converting them so as to include his wife if she survived him. The policies securing the benefits accruing to employees constituted contracts between the insurers and the company but contained a clause under which the company declared itself to be a trustee of the benefits for the persons entitled thereto. On the death of Payton, leaving his wife him surviving, the Estate Duty Office claimed duty on the footing that his death gave rise to an actual passing of the pensions within the meaning of section 1 of the Act. His widow contended that there was no passing under section 1 but that the pensions to which she became entitled in possession on the death of Payton fell in each case within section 2 (1) (*d*) as being an annuity or other interest purchased or provided by the deceased, which was accordingly to be deemed to pass "to the extent of the benefit "accruing or arising . . . on the death of the deceased." That view was greatly to the advantage of the widow, as Payton's estate was very large and a passing under section 1 would entail aggregation, whereas a notional passing under section 2 (1) (*d*) would not.

It was held by this court (affirming Wynn-Parry J.) that the case fell within section 2 (1) (*d*) and not section 1. Lord Evershed M.R. (delivering the judgment of the court) said this[27]: "Mr. Pennycuick therefore goes further and says that under "this contract there has been created a single and identifiable "(and intelligible) item of property, namely, the benefit of the "society's covenant with the company to pay what we may call "the Payton last survivor pension throughout its term; which "piece of property is enjoyed successively and is enforceable "successively by the deceased and the plaintiff. On this case "he contends that the case is in pari materia with the *Duke of* "*Norfolk's* case.[28] We have been unable to accept the argu-"ment. If the society's covenant had been with the company "to pay the latter during some period—for example, a fixed "period or the life of the longest liver of a number of named "persons—a certain annual sum; and if the company had then "declared itself a trustee of the annual sum or of the benefit of "the covenant for A and B successively, it may well be (though "we do not so decide) that the case would have been covered by "the *Duke of Norfolk's* case.[28] But the effect of the contract

[26] [1951] Ch. 1081.
[27] Ibid. 1089.
[28] [1950] Ch. 467.

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"seems to us to be otherwise. Adhering (as enjoined by Mr. "Pennycuick to do) to the actual terms of the bargain, there is "here no covenant with the company to pay the company any-"thing: there is a covenant with the company to pay 'the "'pension,' that is, the annual sum of £*x* by monthly instal-"ments, to the deceased during the period from his retirement "to his death and then to pay the same pension, that is, the "same annual sum by like instalment, to the plaintiff (if she "survives the deceased) during the rest of her life. Though the "distinction be a fine one, there does not seem to us to be in "the latter case, in any real sense of the term, any single and "continuing proprietary interest distinct from the beneficial "interests, under the contract, of the deceased and the plaintiff "respectively, which proprietary interest can be said to 'pass' "on the deceased's death."

The Master of the Rolls later said[29]: "In the *Duke of "Norfolk's* case[30] this court held that the case before them was "covered by *In re Cassel*,[31] which it thought (having regard to "later affirmation and notwithstanding certain criticisms made "of Russell J.'s judgment) binding at least on the Court of "Appeal (see the judgment of Lord Evershed M.R.); but it "held also that the annuity bequeathed by the first and second "codicil, being an item of property separate and distinct from "the beneficial interests therein, 'passed' upon the death of the "first annuitant within the meaning of section 1 of the Act of "1894. In our judgment the present case is essentially different "from the *Duke of Norfolk's* case[32] and also from *In re Cassel*.[33] "In each of the latter cases the annuity arose out of specified "trust property—the provisions of the will directed the trustees "to raise the amount of the annuity yearly out of the income of "the trust funds, for securing which in the *Duke of Norfolk's* "case[34] a term of years was also created. The annuity so raised "was given to the trustees to hold (in the *Duke of Norfolk's* "case), or was to be applied by the trustees (*In re Cassel*[35]) on "trust for certain persons successively. In the present case the "only rights and interests subsisting or capable of subsisting "arise exclusively out of the terms of the contract of insurance. "The only right of property which, according to the suggestion "of the Crown, emerges from the respective policies is a chose "in action. But a mere chose in action cannot, in our judgment, "be considered or comprehended apart and separately from the "right to enjoy, by the terms of the contract, the benefit con-"tracted to be given. If there be any rights or interests in the "company, as distinct from the separate and individual rights "of the pensioners, they seem accordingly to us altogether too "spectral to be fairly analogous to the interests of the trustees

[29] [1951] Ch. 1081, 1091.
[30] [1950] Ch. 467.
[31] [1927] 2 Ch. 275.
[32] [1950] Ch. 467.
[33] [1927] 2 Ch. 275.
[34] [1950] Ch. 467.
[35] [1927] 2 Ch. 275.

"in the *Norfolk*[36] or *Cassel* cases[37] or to be fairly regarded as "'passing' on the death of Mr. Payton within the meaning of "section 1 of the Finance Act, 1894."

These passages make it perfectly plain that *In re Payton*[38] was regarded by the court as a wholly different case from *In re Duke of Norfolk*,[39] the pensions in the former case being purely contractual and not payable out of the rents of a landed estate (as in *In re Duke of Norfolk*) or out of the income of a trust as in the present case. The interests arising out of the policies of insurance in *In re Payton*[40] could aptly be described as the Master of the Rolls described them, as "mere choses in action"; but we must say we deprecate the application of that description to an annuity payable out of the income of a fund under a trust. So far from casting doubt on *In re Duke of Norfolk*[41] it appears to us that *In re Payton*[42] reinforces its authority.

In *In re Weigall's Will Trusts*[43] Harman J. followed *In re Payton*[44] on the ground that, upon the true construction of the gift with which he was concerned, "the two annuities did not "constitute one piece of property which came into existence on "the death of the testator and which passed from the brother "to the widow on his death, but on his death a new beneficial "interest arose which was now vested in the widow. . . ." In other words, in the view taken by the judge of the construction of the gift before him, the case was not one of a continuing annuity. We find ourselves unable to accept that construction of the gift in question, and are accordingly of opinion that *In re Weigall*[45] was wrongly decided.

Be that as it may, in the present case, in our judgment, there was a single continuing annuity. On the death of the deceased his life interest in one half of the annuity no doubt came to an end. But the annuity did not cease. It continued to be payable, with the difference that the half share thereof which had theretofore been payable to the deceased during his life became payable to Phyllis Fawell as the last survivor of the three named beneficiaries. Accepting, as we must, the principles laid down in *Cowley's* case[46] with regard to the respective functions of sections 1 and 2 of the Act, that seems to us to be a reasonably plain case of "passing" within the meaning of section 1, and we think it would be impossible to hold otherwise consistently with *In re Duke of Norfolk*[47] and *In re Cassel*.[48] Still less is it possible to hold consistently with these cases that a continuing annuity payable under a trust out of the income of a fund to two or more persons in succession or (by parity of reasoning) to several persons and the survivors or survivor of them does not constitute property

[36] [1950] Ch. 467.
[37] [1927] 2 Ch. 275.
[38] [1951] Ch. 1081.
[39] [1950] Ch. 467.
[40] [1951] Ch. 1081.
[41] [1950] Ch. 467.
[42] [1951] Ch. 1081.
[43] [1956] Ch. 424.
[44] [1951] Ch. 1081.
[45] [1956] Ch. 424.
[46] [1899] A.C. 198.
[47] [1950] Ch. 467.
[48] [1927] 2 Ch. 275.

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capable of passing on the death of each successive taker other than the last.

For these reasons we are of opinion that this appeal fails and should be dismissed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Charles Russell & Co.*

B. A. B.

[PRIVY COUNCIL.]

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ELEANOR JESSIE DUN . . . . . Appellant;

AND

FRANCIS BOYCE DUN and Another . . Respondents.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales) — Family provision — Facts to be considered as existing at date of testator's death, not as at hearing of application—Account to be taken of events which testator might reasonably be expected to foresee—Testator's Family Maintenance and Guardianship of Infants Act, 1916–1954 (*N.S.W.*), *s.* 3 (1).
Family Provision—Australia (*N.S.W.*).
Judicial Precedent—Decision long undisturbed—Subsequent legislation —Construction of statute—Statute re-enacted in same terms—Statute merely left unamended.

By section 3 of the Testator's Family Maintenance and Guardianship of Infants Act, 1916–1954, of New South Wales: "(1) If "any person . . . disposes of . . . his property . . . by will in such a "manner that the widow, husband, or children of such person . . . "are left without adequate provision for their maintenance . . . , "the court may at its discretion, and taking into consideration "all the circumstances of the case, . . . order that such provision "for such maintenance . . . as the court thinks fit shall be made "out of the estate of the testator for such wife, husband, or "children . . ."

On an application under the above subsection by or on behalf of a dependent of a testator the court, in deciding on the adequacy of the provision, should have regard to the facts as they existed at the date of the testator's death and not as they existed at the date of the application. In so doing the court should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died.

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* *Present*: Viscount Simonds, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning.

The appellant's husband, who died in 1942, by his will, made in 1919, left her certain household and personal effects and pecuniary legacies aggregating £A2,000, and also an annuity of £A600 which, by a codicil made in 1942, was increased to £A800 tax free. At the time of his death the testator's estate was valued at £A22,216, but by 1955 it had increased to £A82,000, while the appellant's financial position had deteriorated. In those circumstances the appellant, having been granted an extension of time for that purpose, applied under section 3 (1) of the Act for further provision to be made for her:—

Held, that the material date in determining whether the appellant was left without adequate provision was the date of the testator's death; that if the facts as at that date were the only things relevant, the provision he made for her was not inadequate; that he did take into account what he thought might be the effect of the war by increasing the annuity in 1942, but that it could not be said that he ought to have foreseen the actual result of the war and post-war conditions, and accordingly the appellant's application had been rightly dismissed.

Coates v. *National Trustees, Executors and Agency Co. Ltd.* (1956) 95 C.L.R. 494 applied.

Re R. A. Forsaith (1926) 26 N.S.W.S.R. 613 overruled.

Bosch v. *Perpetual Trustee Co.* [1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14 considered.

Dictum of Denning L.J. in relation to stare decisis in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell* [1949] 2 K.B. 417 at 429; [1949] 1 All E.R. 749 applied.

Order of the High Court of Australia affirmed.

APPEAL (No. 41 of 1958), by special leave, from an order of the High Court of Australia (December 19, 1957) reversing an order of the Supreme Court of New South Wales in Equity (August 30, 1956) granting an application by the present appellant under section 3 (1) of the Testator's Family Maintenance and Guardianship of Infants Act, 1916–54, of New South Wales for maintenance out of the estate of her deceased husband. The respondents were the husband's executors.

The question arising in this appeal was whether the issue whether an order should be made in the court's discretion should be determined on the facts as they existed at the date of the application or on the facts as they existed at the date of the testator's death.

The appellant was the widow of Thomas Fitzgerald Dun, who died in Sydney on September 10, 1942. By his will, made in 1919, he gave her certain personal effects and pecuniary legacies aggregating £A2,000 and an annuity of £A600 which, by a codicil made in 1942, he increased to £A800 tax free. At the date of his death the value of his estate was about £A22,000. The importance of the relevance of the date for determining the application was that between the date of his death in 1942 and the date of the hearing of the application in 1956, owing to a large rise in the price of wool, a small grazing property, part of his estate, had so increased in value that on its sale by the executors the value of the estate increased to about £A82,000.

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The trial judge (Roper C.J. in Equity), basing himself on *In re R. A. Forsaith*,[1] held that the time at which the existing circumstances should be considered was the date on which the court heard the application, and in addition to the provisions made for the appellant in the will and codicil he granted her a legacy of £A5,000 and an annuity of £A1,500 in lieu of the tax free annuity of £A800.

On appeal by the respondents the High Court of Australia, following *Coates* v. *National Trustees, Executors and Agency Co. Ltd.*[2] which, unknown to the trial judge in the present case, had overruled *In re R. A. Forsaith*,[3] held that the material time in deciding whether the court had a discretion to vary the will was the date of the testator's death, and they allowed the respondents' appeal and dismissed the application. The widow appealed.

1959. Feb. 18, 19. *Gordon Wallace Q.C.* (Australia) and *Anthony Cripps Q.C.* for the appellant.

K. S. Jacobs Q.C. and *D. E. Horton* (both of Australia) for the respondents.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Leeder* v. *Ellis*[4]; *In re Borthwick*[5]; *In re Borthwick, decd.*[6]; *In re Franks*[7]; *In re Porteous, decd.*[8]; *In re Larkin*[9]; *Ormond Investment Co. Ltd.* v. *Betts*[10]; *In re Earl Fitzwilliam's Agreement*[11]; *Delacour* v. *Waddington*[12]; and *In re H. F. Parr, decd.*[13]

April 7. The judgment of their Lordships was delivered by Lord Cohen. This appeal raises a short but important point under a New South Wales statute, the Testator's Family Maintenance and Guardianship of Infants Act, 1916–54. This Act is one of a series of similar, though not identical, Acts which were introduced in New Zealand and in each of the Australian States to enable the court to modify the provisions of the will of a testator who in the opinion of the court had not made adequate provision for the maintenance, education or advancement in life of his or her widow, husband or children by ordering such provision for that purpose as the court might think fit. The question which has now to be decided is whether upon an application under the Act by or on behalf of a dependant of a testator the court, in deciding on the adequacy of the provision,

[1] (1926) 26 N.S.W.S.R. 613.
[2] (1956) 95 C.L.R. 494.
[3] 26 N.S.W.S.R. 613.
[4] [1953] A.C. 52; [1952] 2 All E.R. 814.
[5] [1948] Ch. 645; 64 T.L.R. 471; [1948] 2 All E.R. 635.
[6] [1949] Ch. 395; [1949] 1 All E.R. 472.
[7] [1948] Ch. 62; 63 T.L.R. 583; [1947] 2 All E.R. 638.
[8] [1949] V.L.R. 383.
[9] [1957] S.R.(N.S.W.) 369.
[10] [1928] A.C. 143.
[11] [1950] Ch. 448; 66 T.L.R. (Pt. 1) 174; [1950] 1 All E.R. 191.
[12] (1953) 89 C.L.R. 117.
[13] (1929) 30 N.S.W.S.R. 10.

should have regard to the facts as they existed at the date of the application or to the facts as they existed at the date of the testator's death. It was not disputed that if the latter were the correct date the courts should take into account not only events which had already occurred, but also such happenings as the testator might reasonably be expected to foresee immediately before he died.

Before going into the facts of the case it will be convenient to consider the New South Wales statutes which affect the matter. The first statute was introduced in 1916. Section 3 (1) of the Act (which has remained unchanged throughout) was in the following terms:

"3. (1) If any person (hereinafter called "the testator") "dying or having died since the 7th day of October one thousand "nine hundred and fifteen disposes of or has disposed of his "property either wholly or partly by will in such a manner that "the widow, husband, or children of such person, or any or all "of them, are left without adequate provision for their proper "maintenance, education or advancement in life as the case may "be, the court may at its discretion, and taking into considera-"tion all the circumstances of the case, on application by or on "behalf of such wife, husband or children, or any of them, order "that such provision for such maintenance, education, and ad-"vancement as the court thinks fit shall be made out of the "estate of the testator for such wife, husband, or children, or "any or all of them."

The original Act contained no power to make additional provision for a dependant in the case of intestacy where the court was of opinion that the Wills, Probate and Administration Act did not make adequate provision for such dependant. That power was conferred by an amending Act in 1938 which added the following new subsection to section 3:

"(1A) If any person (hereinafter called "the intestate") "dies wholly intestate after the commencement of the Con-"veyancing, Trustee and Probate (Amendment) Act, 1938, and, "in consequence of the provisions of the Wills, Probate and "Administration Act, 1898, as amended by subsequent Acts, "that are applicable to the distribution of his estate as on "intestacy, his widow, or children, or any or all of them, are "left without adequate provision for their proper maintenance, "education, or advancement in life as the case may be, the "court may, at its discretion and taking into consideration all "the circumstances of the case, upon application made by or "on behalf of such widow, or children, or any of them, order "that such provision for such maintenance, education and ad-"vancement as the court thinks fit shall be made out of the "estate of such person."

Subsections (2) and (3) of section 3 contain provisions relating to the exercise of the power conferred by subsection (1). They read as follows:

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"(2) The Court may attach such conditions to the Order as "it thinks fit, or may refuse to make an Order in favour of any "person whose character or conduct is such as to disentitle him "to the benefit of such an Order.

"(3) In making an Order the Court may, if it thinks fit, order "that the provision may consist of a lump sum, or periodical "or other payments."

Subsection (4) enacts that every provision made under the Act shall, subject to the Act, take effect as if it were a codicil executed immediately before the death of the testator.

Section 5 of the 1916 Act contains limitation provisions requiring the application to be made in the case of a testator dying before the passing of the Act within three months of the date of such passing and in any other case within 12 months of the grant of probate of the will of the testator. When in 1938 applications were made possible in the case of an intestacy a new subsection was added to section 5 requiring any such application to be made within 12 months of the grant of letters of administration.

Until 1954 there was no power to extend the time limits thus fixed, but in that year power to extend the time was conferred by the Administration of Estates Act, 1954, which (inter alia) introduced into section 5 the following new subsection.

"(2A) Notwithstanding anything in subsections (1) and (2) of "this section: (*a*) The time for making an application under "either of those subsections may be extended for a further "period by the Court, after hearing such of the parties affected "as the Court thinks necessary, and this power extends to cases "where the time for applying has already expired, including cases "where it has expired before the commencement of the Ad-"ministration of Estates Act, 1954, but every application for "extension shall be made before the final distribution of the "estate, and no distribution of any part of the estate made "before the application shall be disturbed by reason of the "application or of an Order made thereon."

Their Lordships turn now to the facts of the present case. The applicant (the present appellant) was the widow of Thomas Fitzgerald Dun, who died on September 10, 1942. By his will made on August 18, 1919, he bequeathed to the applicant certain household and personal effects and pecuniary legacies aggregating £A2,000. He also bequeathed to her an annuity of £A600 per annum. By a codicil made on May 16, 1942, he increased this annuity to £A800 per annum and directed that it should be paid free of tax. Subject to certain minor bequests and in the events which happened the testator devised and bequeathed the residue of his estate upon trust for such of his brothers and sisters as should be living at the date of his death in equal shares.

The respondents are the present trustees of the testator's will. At the time of the death of the testator his estate was valued at

£A22,216. The appellant at that date owned land with a building on it towards which the testator had contributed £A3,066. She also owned other property which she had sold for £A4,600 before the date of the application herein.

Having regard to these figures it is not surprising that the appellant made no application under section 3 within 12 months of the grant of probate of the testator's will. By the time that the amending Act of 1954 had become law the position had altered. In 1955 the testator's estate consisted almost entirely of liquid assets and their value was said to be £A82,000. On the other hand, the appellant's position had deteriorated. All that was left of her assets was the former matrimonial home, said to be worth £A8,500 but subject to a mortgage to secure the repayment of the sum of £A4,200.

Taking advantage of the new subsection (2A) of section 5 of the Act the appellant applied for an extension of the time allowed for making an application under section 3 (1) of the Act of 1916, and on June 3, 1955, Myers J. extended the time until June 17, 1955. On June 16, 1955, the appellant made the substantive application under section 3 (1). This came before the Chief Judge in Equity (Roper C.J.) and on August 16, 1956, he granted the application, ordering that in addition to the provisions made for her in the will and codicil of the testator the appellant be paid a legacy of £A5,000 payable on September 30, 1956, and that as from July 1, 1956, in lieu of the annuity and income tax benefits provided in her favour the applicant be paid an annuity of £A1,500 per annum.

In reaching his conclusion Roper C.J. in Equity said that he thought it was clear that had the appellant brought her application within 12 months of the grant of probate, and had that application been heard within the normal reasonable time thereafter, it must have failed, whether the time for considering the circumstances had been taken as the date of death or as the date of hearing the application. He called attention, however, to the subsequent change in circumstances both of the testator's estate and of the appellant, to which their Lordships have already referred, and said that he had now to decide which was the correct date to apply. Basing himself on *In re R. A. Forsaith*,[1] he held that the time at which the existing circumstances should be considered is the date on which the court hears the application. He said that that decision had stood for 30 years and that, although the number of cases in which a material difference exists between the results of considering the circumstances existing at the hearing on the one hand, and at the date of death on the other, are relatively few, there must have been a number of them, and he referred to *In re A. L. Pichon*.[2]

He recognised that a different view had been taken in cases under similar statutes in Victoria, in Queensland and in Tasmania,

[1] (1926) 26 N.S.W.S.R. 613. [2] (1946) 47 N.S.W.S.R. 186.

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but he said that there were slight but important differences between the Acts in force in those States and the New South Wales Act. He also pointed out that under the South Australia Act which, so far as the point under consideration is concerned, is almost identical with the New South Wales Act, the principle of *In re R. A. Forsaith* [3] had been adopted.

Having reached the conclusion that the material time was the date of the hearing of the application, he held that the appellant qualified for an order and made the order their Lordships have stated.

Unfortunately, unknown to the Chief Justice in Equity, the correctness of the decision in *In re R. A. Forsaith* [3] had been considered by the High Court of Australia in the case of *Coates* v. *National Trustees, Executors & Agency Co. Ltd.*[4] Judgment in that case had been given on June 6, 1956. Since the decision in *Coates'* case [4] formed the basis of the High Court decision in the present case their Lordships must consider it at some length. In that case the relevant statutory provision in Victoria was section 139 of the Administration and Probate Act, 1928, as amended by the Administration and Probate (Testators Family Maintenance) Act, 1957. This section as so amended reads, so far as material, as follows: "If any person . . . dies . . . leaving "a will without making therein adequate provision for the proper "maintenance and support of the testator's widow, widower or "children the court may in its discretion on application by or on "behalf of the said widow, widower or children order that such "provision as the court thinks fit shall be made out of the estate "of the testator for such widow, widower or children."

It is unnecessary to refer to the facts of the particular case under consideration in *In re Coates* [4]; it is sufficient to say that the High Court by a majority consisting of Dixon C.J., Webb and Kitto JJ., came to the conclusion that the question whether the provision made in a will for an applicant is inadequate for his proper maintenance is to be determined, according to the circumstances existing not as at the date of the hearing of the application, but as at the date of the death of the testator although, if the question be answered in the affirmative the court, in exercising its discretionary power to make such provision as it thinks fit, must take into account the facts as they exist at the time of making its order.

In reaching his conclusion Dixon C.J. referred to decisions in New Zealand and some of the Australian States in cases arising under similar statutes. He pointed out that in New Zealand, Tasmania, Victoria and Queensland the view had been taken that the question was to be determined as at the date of the death of the testator or testatrix, whereas in New South Wales and South Australia the view had been adopted that the sufficiency of the provision in the will must be determined as at the time

[3] 26 N.S.W.S.R. 613.

[4] (1956) 95 C.L.R. 494.

when the court is dealing with the question. Referring to *In re R. A. Forsaith* [5] he cited the observation of Harvey C.J. in Equity in that case that "looking at the words of the Tasmanian statute "there is no loophole of escape from that construction," i.e., a construction adopting the date of death as the crucial date. Dixon C.J. continued [6]: "In spite of the difference in language "between the New South Wales Act and the Tasmanian and for "that matter the Victorian, it may be doubted whether the dis-"tinction taken by Harvey C.J. in Equity is well founded. The "legislation of the various States is all grounded on the same "policy and found its source in New Zealand. Refined distinc-"tions between the Acts are to be avoided." Accordingly, he preferred the Victorian view that the material date was the date of the death, but he pointed out that the question what is proper maintenance and support involves the future of the dependant to be maintained or supported and that, accordingly, the testator must be presumed to take into account contingent events as well as what may be considered certain or exceedingly likely to happen.

Kitto J. summed up his reason for agreeing with the Chief Justice in the following passage [7]: "It remains only to say ex-"plicitly that once an applicant establishes that the case falls "within the class in which the court is given jurisdiction, the cir-"cumstances as they then exist may and should receive full "consideration by the court in deciding what provision it thinks "fit to make for the proper maintenance and support of the "applicant. It is true to say that in the light of all those circum-"stances the court will do what it considers wise and just for "the purpose. But this has no bearing upon the question which "is before the court at the preliminary stage—the question "whether the case is shown to be within the limits which the "legislature has seen fit to set to the extraordinary jurisdiction it "has conferred on the court. At that stage the court must be "satisfied, before commencing to think what provision it would "be wise and just to make in the circumstances as they then "exist, that the testator's will did not operate to make such a "provision for the applicant's maintenance and support as would "have been made if a complete knowledge of the situation and a "due sense of moral obligation with respect to those matters had "combined to dictate a new will to the testator immediately "before he died."

Having regard to the decision in *Coates'* case [8] the respondent executors appealed to the High Court of Australia in the present case, and the High Court by a majority of three (Dixon C.J., Kitto and Taylor JJ.) to two (McTiernan and Williams JJ.) allowed the appeal and dismissed the application. Their Lordships all agreed that in view of the decision in *Coates'* case [8] the material time in deciding whether the court had a discretion to

[5] 26 N.S.W.S.R. 613.
[6] 95 C.L.R. 507.
[7] Ibid. 528.
[8] 95 C.L.R. 494.

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vary the will must be taken to be the date of the testator's death. They also agreed that in reaching its decision the court was entitled to take into account circumstances which should have been foreseen by the testator at the time of his death, but they differed in the application of this principle to the facts of the present case. The majority said: "But there is nothing in the "case to suggest that the vast increase in the value of the estate "could have been foreseen; indeed, it may well be thought that "if the events which produced this result could reasonably have "been foreseen their actual occurrence would not have occasioned "such a marked and rapid increase in the value of the estate. "Looking at the circumstances as they existed at the death of "the testator we think it is impossible to say that the provision "made by him for the applicant was ungenerous and when regard "is had to the incidence of death and estate duties and testa-"mentary expenses; it is clear that it cannot be characterised as "inadequate. On the contrary, if, as the testator appears to "have thought, it was desirable that the main provision for his "widow should consist of an annuity, he may well have con-"sidered that the annuity provided by his codicil was as much as "his estate would be able to provide. As already appears, it is "clear that Roper J. would have dismissed the respondent's "application if he had been aware that in *In re R. A. Forsaith* [9] "had been overruled. We agree that such a result would have "been inevitable and, accordingly, the appeal should be allowed "and the order of the Supreme Court set aside."

McTiernan and Williams JJ. took the opposite view. Since their conclusion is that which Mr. Wallace invited their Lordships to adopt, it will be convenient to cite the material passage from the judgment of Williams J.: "What he [the testator] did not "appear to foresee, but he reasonably might have foreseen, was "that the longer the war continued the more serious its economic "consequences would be upon the value of money and the cost "of living and therefore upon the financial position of people with "fixed incomes. He evidently foresaw that it would probably not "be advisable to sell his farm or produce business for some time "after his death, presumably because he considered that it was "likely that the income and assets of his estate would be built up "by continuing these businesses, and he must evidently have "contemplated that this would assist his widow because he "provided that no sale was to take place for five years after his "death without her consent. The only vital thing that he "appears to have overlooked in deciding what would be adequate "for the proper maintenance of his widow in the future stretching "forward from his death, which it can be said that as a wise "husband he should have been able to foresee, was the danger of "providing for his widow, then only 42 years of age, mainly "leaving her a fixed income. The testator in his wisdom should

[9] 26 N.S.W.S.R. 613.

"have realised, as Mr. Wallace submitted, that the only safe "course would be to leave her at least the income or a proportion "of the income of his estate, but with a proviso that if her "income fell below a certain amount it should be supplemented "out of capital, either as of course or possibly at the discretion "of his trustees. As he had no children his widow was the only "person with any real moral claim upon his bounty."

From the decision of the High Court the appellant, by leave granted by Order in Council made on June 3, 1958, appealed to this Board. Mr. Wallace on her behalf submitted that: I. Whatever be the true construction of the statutes dealing with similar subject-matter in other jurisdictions than New South Wales, the New South Wales statute must be construed according to its own language and so construed the material date for all purposes under section 3 (1) was the date of hearing the application. II. Even if the date of death was the material date, the correct conclusion as to what the testator should have foreseen was that indicated by Williams J., and on this ground the judgment of the trial judge should be restored.

On the first point Mr. Wallace relied on the decision of Harvey C.J. in Equity in *In re R. A. Forsaith.*[10] The judge in that case based his conclusion on two points, (1) the omission in the Victorian statute of the words "upon his death," which in the Tasmanian statute follow upon the words "in such manner "that," and (2) the use of the words "are left," bearing in mind that the section applies not only to persons dying after the passing of the Act but also to persons who died between October 7, 1915, and the passing of the Act. "I think," said his Honour,[11] "in the cases of such wills the court would be "forced to the conclusion that the period of time which was "to be considered was the date on which the court was dealing "with the matter, and the same construction, therefore, must "apply in the case of all wills which are the subject of the "section."

Neither of these points carry conviction to their Lordships' minds. On the first point their Lordships agree with Mr. Wallace that the courts' first duty is to consider the meaning of the language used in the particular statute under consideration, but quite apart from decisions on other statutes their Lordships are of opinion that the natural construction of a section dealing with the question whether a testator's dependants "are left" without adequate provision is to look at the date when he left them, i.e., the date of his death. Nor do their Lordships think that this conclusion is affected by the fact that the section applies to testators who died between October 7, 1915, and the passing of the Act on September 18, 1916. Their Lordships can see no reason why in deciding whether such a testator had made adequate provisions for his dependants the court should not look at

[10] 26 N.S.W.S.R. 613. [11] Ibid. 614.

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the position as it was on the date of the testator's death. The case of a testator who died before September 18, 1916, is not before their Lordships, but their Lordships as at present advised prefer the date of the death in the case of such a testator to the date suggested by Kitto J. in *Coates'* case,[12] viz., the date of the commencement of the Act.

In re A. L. Pichon[13] does not carry the matter any further. In that case the testatrix had made no provision for her only child and left the whole of her estate to her executor M. beneficially. The executor died before the application under section 3 (1) came on for hearing. On these facts, quite apart from the fact of the death of M., there was a prima facie case of inadequate provision for the daughter. In exercising his discretion as to the amount of the further provision to be made Roper J. would clearly have been entitled to take into account the fact that the only beneficiary named in the will was dead.

The two South Australian cases to which their Lordships' attention was called also carry the matter no further. In *In re Gerloff*[14] Richards J. refers to *In re R. A. Forsaith*[15] with approval, but expressly says he did not find it necessary to express a definite opinion on the question of date. In *In re Wheare*[16] Paine A.J. follows *In re R. A. Forsaith*[17] and adds "there is, I "think, another provision in our Act which warrants that "decision. Section 5 (4) of our Act enables the court at any "time and from time to time to rescind or alter any order." It is not clear whether the judge thought that this section would enable a provision already made to be increased. The corresponding section in the New South Wales Act is section 6, subsection (4). Their Lordships do not think this section would enable a provision made by a previous order to be increased, as was pointed out in *In re Denis Molloy, decd.*,[18] its purport is to enable a provision made under the Act to be reduced or cancelled. So, also, section 8 enables the court to reduce or discharge an order for periodic payments where the circumstances of the dependant in whose favour the order was made improves. Their Lordships do not think, therefore, that these provisions throw any light on the question they have now to decide.

Mr. Wallace's sheet anchor on his first point was the judgment of Fullagar J. in *Coates'* case[19] in which, while agreeing with the order which was made, he dissented on the question of the material date. The main grounds of his dissent were: (1) that to take the date as the date of hearing the application would be more in accord with the general object of the legislation and would give the court a freer hand in the exercise of a wide discretion; (2) it is more realistic; (3) it avoids an unnecessary question—what must the testator be taken to foresee—which

[12] 95 C.L.R. 494, 525.
[13] 47 N.S.W.S.R. 186.
[14] [1941] S.A.S.R. 156, 161.
[15] 26 N.S.W.S.R. 613.
[16] [1950] S.A.S.R. 61.
[17] 26 N.S.W.S.R. 613.
[18] (1926) 28 N.S.W.S.R. 546.
[19] 95 C.L.R. 494, 521.

savours of artificiality and which often cannot be satisfactorily answered.

Their Lordships recognise the force of these observations but do not think they can justify a disregard of what their Lordships consider to be the plain meaning of the statute. Moreover, their Lordships think that the intention of all the statutes in this field was to enable the court to vary the provisions of a will in cases where it was satisfied that the testator had not made proper provision for a dependant: it would be contrary to this intention to judge a testator not by the position as it was at the time of his death but by the position as it might be as the result of circumstances which the testator could not reasonably have been expected to foresee. Their Lordships recognise that it may sometimes be difficult to determine what the testator should have foreseen, but the difficulty is no greater than is often incurred in assessing damages in personal injury cases and Parliament has not hesitated to cast this burden on a judge.

Reference was made in the course of the argument to the decision of this Board in *Bosch* v. *Perpetual Trustee Co.*,[20] a decision on the section which their Lordships are now considering. The question of the material date in deciding whether the court had jurisdiction was not in issue, but their Lordships think that the observations of Lord Romer, delivering the decision of the Board, as to the proper approach of a judge dealing with an application of an Act are of assistance. Lord Romer said[21]: "Their Lordships agree that in every case the court must place "itself in the position of the testator and consider what he ought "to have done in all the circumstances of the case, treating the "testator for that purpose as a wise and just, rather than a fond "and foolish, husband or father. This no doubt is what the "learned judge meant by a just, but not a loving, husband or "father. As was truly said by Salmond J. in *In re Allen, decd.*, "*Allen* v. *Manchester*[22]: 'The Act is . . . designed to enforce "'the moral obligation of a testator to use his testamentary "'powers for the purpose of making proper and adequate pro-"'vision after his death for the support of his wife and children, "'having regard to his means, to the means and deserts of the "'several claimants, and to the relative urgency of the various "'moral claims upon his bounty. The provision which the court "'may properly make in default of testamentary provision is "'that which a just and wise father would have thought it his "'moral duty to make in the interests of his widow and children "'had he been fully aware of all the relevant circumstances'."

If that be, as their Lordships think it is, the correct approach, it seems to their Lordships necessarily to involve that the court must look to the position as at the date of the testator's death.

Mr. Wallace also relied on the amending Acts of 1938 and

[20] [1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14.

[21] [1938] A.C. 478–479.

[22] [1922] N.Z.L.R. 218, 220.

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1954 as supporting his argument. The first of those Acts introduced section 3 (1A) dealing with cases of intestacy, and their Lordships are unable to see any reason for thinking that the court, in deciding the question of jurisdiction in cases of intestacy, should look at any other date but the date of the death of the intestate.

The provisions of the 1954 Act on which Mr. Wallace relied were those enabling the court to extend the time within which application may be made for provision under section 3, subsection (1) or subsection (1A). He submitted that the intention must have been to enable the court to look at the position as it might be at the date of the hearing of the application for an extension of time in deciding whether to grant an extension and that it followed that if leave were granted the court in dealing with the substantive application must look at the date of hearing of that application for all purposes. Their Lordships do not agree: they think that Mr. Jacobs gave the right answer when he said that the section in question was purely procedural and could not have been intended to effect an alteration in substantive law or to enable an applicant to improve her position by being dilatory in making her application.

Mr. Wallace sought to meet this argument by saying that Parliament when it passed the Act must be taken to have known of the decision in *In re R. A. Forsaith*[23] and to have intended that the court should proceed on the basis that that decision was correct. He said that *In re R. A. Forsaith*[23] had stood unchallenged for 30 years and more. He relied on a passage in the judgment of Viscount Buckmaster in *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*[24] where he said,[25] citing James L.J. in *Ex parte Campbell*[26]: "Where once certain words in "an Act of Parliament have received a judicial construction in "one of the Superior Courts, and the legislature has repeated "them without alteration in a subsequent statute, I conceive "that the legislature must be taken to have used them according "to the meaning which a court of competent jurisdiction has "given to them." Their Lordships accept without question this statement of the law, but the facts of the present case do not make the principle applicable.

Their Lordships desire to refer also on this point to the observations of Denning L.J. in *Royal Crown Derby Porcelain Co. Ltd.* v. *Russell*[27] where he said: "The true view is that "the court will be slow to overrule a previous decision on "the interpretation of a statute when it has long been acted "on, and it will be more than usually slow to do so when "Parliament has, since the decision, re-enacted the statute in "the same terms. But if a decision is, in fact, shown to be

[23] 26 N.S.W.S.R. 613.
[24] [1933] A.C. 402; 49 T.L.R. 391.
[25] [1933] A.C. 412.
[26] (1870) L.R. 5 Ch. 703, 706.
[27] [1949] 2 K.B. 417, 429; [1949] 1 All E.R. 749.

"erroneous, there is no rule of law which prevents it being "overruled." In the present case Parliament has not re-enacted the relevant section in the same terms; it has only left it unamended. Moreover, for the reason their Lordships have given they consider the decision in *In re R. A. Forsaith*[28] has been shown to be wrong.

For the reasons their Lordships have stated their Lordships consider that Mr. Wallace's first submission must be rejected and that the material date in determining whether a dependant was left without adequate provision is the date of the testator's death.

It remains to consider whether the majority of the High Court were right in rejecting his alternative submission that the testator ought to have foreseen the events which in fact occurred and if he had done must have made more ample provision for the appellant.

Two things seem clear, (1) that if the facts as at the date of his death were the only things relevant, the provision made was such that he could not be said to have made inadequate provision for her, (2) that he did take into account what he thought might be the effect of the war, for in May, 1942, he made a codicil increasing the amount of his wife's allowance and made it payable free of tax. Ought he to have foreseen the actual result of the war and post-war conditions? On this point their Lordships are not prepared to differ from the majority of the High Court. It seems to their Lordships that this is just the kind of point on which judges familiar with conditions in Australia are more likely to reach a correct conclusion than their Lordships sitting in London. They would add that on the facts of this case they think they would have reached the same conclusion as the majority of the High Court.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The circumstances are very special and having regard to them their Lordships will make a similar order as to costs to that made by the High Court, namely, that the costs of both the appellant and the respondents be taxed as between solicitor and client and paid and retained out of the estate of the testator.

Solicitors: *Light & Fulton; Bell, Brodrick & Gray.*

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[28] 26 N.S.W.S.R. 613.

[COURT OF APPEAL.]

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BARBEY AND OTHERS *v.* CONTRACT AND TRADING CO. (SOUTHERN) LTD.

[1958 B. No. 415.]

Exchange Control—Proceedings for debt not payable without Treasury permission—Implied term of contract—Bill of exchange—Payment outside United Kingdom—Holders of bills resident outside scheduled territories—Treasury consent to payment of bills not obtained—Action on bills in England by holders—Right of foreign creditor to payment—Exchange Control Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 14), *ss.* 6 (1), 33 (1), *proviso, Sched.* 4, *para.* 4.

The plaintiffs were foreigners, who were the holders in due course of bills of exchange amounting to £8,700, of which the defendants, an English company, were the acceptors. The plaintiffs were resident outside the scheduled territories, and, accordingly, Treasury permission was required by virtue of the Exchange Control Act, 1947,[1] for the payment of the bills by the defendants

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

[1] Exchange Control Act, 1947, s. 6: "(1) Except with the permission "of the Treasury, no person resident "in the United Kingdom shall, subject to the provisions of this section, "make any payment outside the "United Kingdom to or for the credit "of a person resident outside the "scheduled territories. . . ."

S. 33: "(1) It shall be an implied condition in any contract that, "where, by virtue of this Act, the "permission or consent of the Treasury is at the time of the contract "required for the performance of any "term thereof, that term shall not "be performed except in so far as the "permission or consent is given or is "not required: Provided that this subsection shall not apply in so far as it "is shown to be inconsistent with the "intention of the parties that it "should apply, whether by reason of "their having contemplated the performance of that term in despite of "the provisions of this Act or for any "other reason. (2) Notwithstanding "anything in the Bills of Exchange "Act, 1882, neither the provisions of "this Act, nor any condition, whether "express or to be implied having "regard to those provisions, that any "payment shall not be made without "the permission of the Treasury "under this Act, shall be deemed to "prevent any instrument being a bill "of exchange or promissory note. (3) "The provisions of the Fourth Schedule to this Act shall have effect with "respect to legal proceedings, arbitrations, bankrupcty proceedings, the "administration of the estates of "deceased persons, the winding up of "companies, and proceedings under "deeds of arrangement or trust deeds "for behoof of creditors. . . ."

Fourth Schedule, para. 4 (1): "In "any proceedings in a prescribed "court and in any arbitration proceedings, a claim for the recovery of "any debt shall not be defeated by "reason only of the debt not being "payable without the permission of "the Treasury and of that permission "not having been given or having "been revoked. . . . 5.—(1) In any "bankruptcy, in the winding up of "any company or in the administration of the estate of any deceased "person . . . a claim for a sum not "payable without the permission of "the Treasury shall, notwithstanding "that the permission has not been "given or has been revoked, be "admitted to proof as if it had been "given and had not been revoked "... 6. A debt for the payment of "which the permission of the Treasury is required under this Act shall, "if in other respects it complies with "the requirements of subsection (1) "of section 4 of the Bankruptcy Act, "1914, be allowed to be a good petitioning creditor's debt, notwithstanding the said requirement, if

to the plaintiffs. No such permission was granted. The plaintiffs sued the defendants on the bills of exchange and applied for summary judgment under R.S.C., Ord. 14. Apart from the possible effect of the Act of 1947, the defendants did not dispute their liability on the bills.

The defendants contended that the plaintiffs' claim was defeated, not only by the withholding of Treasury consent, but also by the implied term in section 33 (1) of the Act of 1947, and that therefore the plaintiffs could not bring themselves within paragraph 4 of the Fourth Schedule to the Act, which was limited to cases where the parties had excluded the implied term:—

Held, that paragraph 4 of the Fourth Schedule was not limited in its effect to contracts within the proviso to section 33 (1), but applied also to cases where a term was implied under section 33 (1) itself; accordingly, the plaintiffs' claim was not defeated by reason of Treasury permission not having been given.

Cummings v. *London Bullion Co. Ltd.* [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383 applied.

APPEAL from McNair J., sitting in chambers.

The plaintiffs were a number of foreign individuals carrying on a merchant banking business in Switzerland, known as Lombard Odier et Compagnie. They were the holders in due course of certain bills of exchange amounting to £8,700, of which the defendants, an English company, the Contract and Trading Co. (Southern) Ltd., were the acceptors. There was no special term relating to the contract contained in the bills of exchange.

Since the plaintiffs were resident outside the scheduled territories within the meaning of the Exchange Control Act, 1947, Treasury consent was required to the payment of the bills by the defendants to the plaintiffs, but no such consent was granted. The plaintiffs brought an action against the defendants on the bills of exchange, and applied for summary judgment under R.S.C., Ord. 14. Apart from the effect of the Act of 1947, the defendants did not dispute their liability on the bills of exchange, but they contended that because of the implied term introduced into the contract by section 33 (1) of the Act, postponing performance of the term relating to payment until Treasury consent was given, no cause of action had yet vested in the plaintiffs; paragraph 4 of the Fourth Schedule to the Act of 1947, which, on the face of it, gave the plaintiffs a remedy, did not, the defendants contended, apply to cases where the contract contained the implied term imported by section 33 (1).

Master Jacob rejected this contention and gave the plaintiffs leave to sign final judgment, the effect of which was that the money had to be paid into court. The defendants appealed to McNair J., the judge in chambers, but he upheld the master's order and dismissed their appeal. The defendants appealed.

"and to the extent that the debt can "be satisfied either by a payment "into court or by a payment to a "blocked account."

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Raymond Kidwell for the defendants.

Norman Tapp for the plaintiffs.

The cases mentioned in argument are referred to in the judgments.

Lord Evershed M.R. This appeal raises a question of the effect, in circumstances which I will mention, of the provisions of the Exchange Control Act of 1947, and more particularly the effect of a decision of this court under that Act in *Cummings* v. *London Bullion Co. Ltd.*[1]

His Lordship stated the facts, and continued: By section 6 (1) of the Act of 1947, which is in Part II, it is provided: "Except with the permission of the Treasury, no person resi-"dent in the United Kingdom shall, subject to the provisions "of this section, make any payment outside the United King-"dom to or for the credit of a person resident outside the "scheduled territories." There is no doubt that, upon its terms, that section applies so as to prevent payment by the defendants, being persons resident in the United Kingdom, to the plaintiffs, who are persons resident outside the United Kingdom, or outside the scheduled territories, unless permission is first obtained from the Treasury; and the fact is that at the present time, for reasons which are not relevant to this matter, the permission has not been granted.

If the matter depended solely on section 6 (1) of the Act of 1947, it would appear that the answer to the suit brought by the plaintiffs against the defendants would be: "We cannot pay "because by an Act of Parliament, which binds us, we are "prevented from making any payment, and indeed it would be "illegal on the face of section 6 for us to attempt so to do." But certain other provisions of the Act have also been discussed, and I will refer to them.

It should be borne in mind that the Exchange Control Act, 1947, covers a number of transactions; it is not confined merely to cases of contracts to pay sums of money. Thus, in Part III, as Mr. Tapp for the plaintiffs pointed out, securities and the issue of securities constitute the subject dealt with, and in Part IV there are restrictions on imports, exports and the like. Part VI of the Act is headed "Supplemental," and I think it true to say broadly of it that it is concerned with the mechanics of the main subject-matter of the Act. Section 33 appears in Part VI, and subsection (1), which has been mainly the subject of debate before us, provides: "It shall be an implied condition "in any contract that, where, by virture of this Act, the per-"mission or consent of the Treasury is at the time of the contract "required for the performance of any term thereof, that term "shall not be performed except in so far as the permission "or consent is given or is not required."

[1] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.

It will be observed that the terms of section 33 (1) are not confined to the case of a money payment; they cover on their face any case where performance of the term of a contract is one prevented by the terms of the Act save with Treasury permission. Paraphrasing the subsection slightly, it is intended to achieve this, that where the performance of any term—for example, payment of a sum of money—cannot be made without permission, then a term will be implied into that contract that the performance is not to take place until the permission is given. But I would think that the primary object of that subsection is to prevent its being said that, because of this requirement as a condition of the contract, therefore in cases in which permission has not been given, or cannot be obtained, the contract is automatically put an end to; it so to speak preserves the contract by reading into it a condition to cover the difficulty created by the Act of 1947.

That being, as I think, the purpose and meaning of section 33 (1), it is not perhaps surprising that a proviso follows in these terms: "Provided that this subsection shall not apply "in so far as it is shown to be inconsistent with the intention "of the parties that it should apply, whether by reason of their "having contemplated the performance of that term in despite "of the provisions of this Act or for any other reason."

Mr. Tapp contended that the proviso was limited in purpose and in effect to saying that a contract on which it was, on the face of it, illegal to pay—and he cites an example of a positive contract in contravention of the Act of 1947—was not converted into a legal contract by section 33 (1).

It is not in the events, as narrated here, necessary for me to express final conclusions on this matter, but since the question has been argued, I ought to say that I am unable, as at present advised, to accept that view of the proviso; I think its natural sense is a rider, and a not unnatural rider, to my construction of the purpose of the subsection. It may, of course, cover the case where, without the proviso, an illegal contract would be made legal. I say no more about that; but if that had been the sole intention, there is a well-known formula in Acts of Parliament which might have been adopted. But I should have thought that it was intended to cover a number of cases where, for example, it would not be right, having regard to the express intention of the parties, to preserve a contract by implying the term stated in the subsection, when the true intent would be that, given the absence of permission, the contract would come to an end; and in that connection I refer to the last five words of the proviso—"or for any other reason."

[His Lordship read section 33 (2) and (3) and continued:] I turn now to the Fourth Schedule. In the copy before me, there appears in the margin "section 33"; in its opening paragraph, there is a reference to the provisions of Part II of this Act, in which section 33 is not contained, but that is neither

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here nor there; it says that the provisions of Part II shall apply to sums required to be paid by any judgment, etc. Part II includes section 6, which I have already read, and this and the earlier paragraphs are particularly concerned with the case of a man who has obtained a judgment, and the Exchange Control Act, 1947, comes into operation and provides that it shall have the effect stated when the debt is a judgment debt. I can pass over the first three paragraphs, therefore, and go to paragraph 4, on which particularly Mr. Kidwell has addressed an attractive and forceful argument. Paragraph 4 (1) provides: "In any "proceedings in a prescribed court"—and it may be said that the Supreme Court is such a court—" . . . a claim for the recovery "of any debt shall not be defeated by reason only of the debt "not being payable without the permission of the Treasury and "of that permission not having been given or having been "revoked."

[His Lordship read paragraphs 5 (1) and 6 and continued:]

The argument of Mr. Kidwell is to this effect: He says—and so far there is no doubt that he says rightly—that the contract here sued upon, namely, the bill of exchange, is a contract, the performance of the term of payment whereof requires Treasury permission, and there being no expressed inconsistency of intention, that is made, by implication, a condition of the contract for performance. So, he says, if you look at paragraph 4, it is not true to say that in these proceedings the claim of the plaintiffs for recovery of their £8,700 is defeated by reason *only* of the debt not being payable without permission of the Treasury and of that permission not having been given, but also because the requirement of permission being applicable, it is a term of the contract by implication that until the permission has been obtained the performance is not due.

When Mr. Kidwell first put the point, it seemed to me, I must say, one of attraction, because the formula "by reason only of "the debt not being payable without permission" seems to be something different, at any rate to a lawyer, from a case where by virtue of an express subsection of the Act there is added an implied term of the contract, in reliance on which Mr. Kidwell can say performance is not yet due by the terms of the contract itself.

However, having carefully considered the case, with the assistance of counsel on both sides, and in the light of the general scope and purpose of the Act, and particularly of paragraphs 5 and 6 in the Fourth Schedule, my present view is against the contention of Mr. Kidwell. Having regard to *Cummings* v. *London Bullion Co. Ltd.*,[2] it is not, strictly speaking, necessary that I should express any view of my own; but I do say, though I think the case is not free from difficulty, that my own inclination is that paragraph 4 cannot have been intended to make a fine distinction between what I might call the ordinary case where you

[2] [1952] 1 K.B. 327.

do imply a term (in order, as I think, to prevent possible frustration of the contract), and what I should assume to be the rarer case, where the parties to a contract have by express language or otherwise shown that they do not intend section 33 (1) to apply.

I am assisted in my inclination in that direction by the terms of paragraphs 5 and 6; for it would appear to me to be somewhat odd that if Mr. Kidwell's argument is right, a creditor in the position of the plaintiffs here should not be able to invoke paragraph 4 (being in that respect in a worse position than the parties to a contract who have been at some pains to evade the Act), but that he should none the less be entitled to rely, as the terms of the paragraph seem to me plainly to indicate, upon both paragraphs 5 and 6; that is to say, he could rely upon his claim to support a winding-up petition or by way of proof in a winding up, and he could rely upon it in bankruptcy proceedings, though he could not, according to the argument, take any step, under the Schedule, aimed at getting payment into court. In other words, he would be entirely without redress, while at the same time he could rely upon it in these cases under paragraphs 5 and 6. It seems to me that it would appear a strange anomaly; but what I have said a moment ago about being without redress brings in—and this is a convenient stage at which to introduce it—the decision in the *Cummings* case.[3]

It was plainly the view of all three of the judges of this court in the *Cummings* case [3] that where, as here, a person had a money claim, but where the proviso to section 33 (1) had not been brought into operation—namely, when it was an implied term that until permission was obtained, the performance was not strictly due—such an action was not without redress; that he could invoke the provisions of the Fourth Schedule by getting a judgment, the effect of which was to compel payment into court.

That view, to my mind, seems to conform, as I have already indicated, to the tenor of the Act and of the Fourth Schedule, and certainly with the justice of the case, and undoubtedly it was the view which all three of the judges expressed.

For reasons which I will explain presently, it is Mr. Kidwell's submission that those reasons and that view were obiter; they were not a necessary part of the decision, and therefore they do not bind us today; but, first of all, I will state the facts and the point in the *Cummings* case [3] and make my references to the three judgments.

The case was one in which the defendants, a London firm, were liable under a contract of sale to make a repayment in dollars to the plaintiff, an American citizen, upon the return to them of a certain piece of jewellery, a brooch. At the date when the brooch was returned, namely August 15, 1949, the sum of dollars which was repayable, namely 3,200 dollars, when converted into sterling at the then rate of exchange was equivalent to £796 0s. 8d. The

[3] [1952] 1 K.B. 327.

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defendants could not pay then, because they had not obtained Treasury sanction. They did obtain the Treasury sanction some six weeks later on September 29, 1949, but in the interval between those two dates there had been what is commonly called a devaluation of sterling in relation to dollars, so that the amount of dollars, namely 3,200, translated into sterling on the later date was not £796 0s. 8d., but £1,142 17s., considerably more; and the argument between the parties was: Which was the right figure? The plaintiff sought to recover the larger sum of £1,142 17s.; Slade J. concluded in the defendants' favour that the calculation must be carried out when, according to the terms of the contract, the sum should have been repaid and the brooch had been returned, that is to say, on August 15; but this court held that that was not right, and that when you look at section 33 (1), then the contract itself with its implied terms made September 29 the performance date and not August 15, with the consequence that £1,142 17s. was the right figure.

It is, however, plain that in the course of the argument the court was invited to consider, and did consider, what on that view was the effect of the Fourth Schedule, which is introduced into section 33 by subsection (3). That invitation arose in this way, counsel for the defendants said: "If Slade J.'s view is wrong—"if, that is to say, the performance date for the purpose of calcu-"lating the amount to be paid awaits permission from the "Treasury, then if permission is not obtained, the plaintiff has "no remedy at all and there is nothing he can do; we have in those "circumstances to treat the contract as so amended that he is "left without any redress." To that argument, the court replied: "No, he has redress; he can apply for judgment, and by "the terms of the Fourth Schedule, the date on which the debt "would become payable is the date on which the debtor could "pay the debt into court, namely as soon as the writ was served "upon him."

That argument will, of course, necessarily carry with it the view that paragraph 4 of the Schedule was applicable in such a case as that which was before the Court of Appeal, namely the case in which section 33 (1) had implied the term into the contract; in other words, that paragraph 4 was not limited to a proviso case.

All that, I think, is made quite clear if you look at certain passages from the three reserved judgments, and I do so because of the contention of Mr. Kidwell that all this can be disregarded as mere obiter. The leading judgment was delivered by Somervell L.J., who said[4]: "It was rightly pointed out that if a writ "is issued before permission is given a further problem arises if "the judge was wrong in holding that August 15 was the date for "the conversion. The combination of section 33 and Schedule IV "produces a novel position. Until a writ is issued, the person

[4] [1952] 1 K.B. 327, 335.

"liable cannot legally make the payment in dollars. Once a writ "is issued, he can legally discharge his obligation by payment "of whatever is the appropriate sum in sterling into court. This "is an obligation created by the statute on the issue of a writ. "We have not to decide that point on this appeal. It was, "however, suggested that it sets a problem incapable of solution, "unless one applies the principle adopted by the judge. . . . "If, however, he pays into court, or if the case goes to judgment, "I at any rate see no difficulty or illogicality in taking the date "when the obligation could have been discharged by a payment "into court as the proper date for conversion."

Denning L.J. dealt with the same point as follows[5]: "The "present is an illustration of a divergence. The cause of action "here arose on August 15, 1949. That is shown by the fact that "at any time thereafter the creditor could have brought an action "in the English courts and recovered judgment: see paragraph 4 "of Schedule IV to the Act of 1947."

Even more specific perhaps for the present purposes is the language of Romer L.J.[6]: "I appreciate the force of Mr. Roche's "contention (which impressed the judge) that on the view above "expressed the defendants, although in possession of the brooch, "would never become liable to repay to the plaintiff the purchase "price if Treasury consent to the payment was withheld. The "plaintiff would not, however, be wholly without redress. The "defendants' inchoate or conditional liability to the plaintiff under "the express terms of the contract is, for many purposes, treated "as a 'debt' by Schedule IV to the Act and sufficiently preserves "the character of a debt to enable the plaintiff to sue; on obtain-"ing judgment in such an action the sterling equivalent of the "money (to be converted, I agree, in accordance with the prin-"ciple which my Lord has indicated) would be brought into court "and thus kept safely for the plaintiff, who could have then "applied for the consent of the Treasury to payment out to "himself."

It cannot be doubted that all three of the judges applied their minds to this point, and all three must have interpreted paragraph 4 of the Schedule as applicable to a section 33 (1) case. I am quite unable to accept the view that this part of the reasoning of the three Lords Justices can fairly be described as "per "incuriam." It is, of course, quite true—or I will assume it to be true, though the arguments are not reported—that the possibility of limiting paragraph 4 of the Schedule to what I will call a proviso case was not debated or considered. None the less, the court expressed the clearest possible view that paragraph 4 of the Schedule did cover a case of which the present is an example, and that conclusion was one to which the court deliberately came. It is said that it was obiter and was not really the ratio of the decision; but I am not quite sure that I agree with that either.

[5] [1952] 1 K.B. 327, 336. [6] Ibid. 337.

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It was apparent that the view that the plaintiff would be, or might be, without redress and that an anomaly would be presented as regards dates unless the earlier date were taken was a ground upon which particularly Slade J.[7] had decided the case as he did in favour of the defendants, and it is at least clear that this court, in arriving at a conclusion in favour of the later date, and to that extent therefore differing from the grounds which had found favour with the judge, went into this question and reconciled the apparent divergence by construing, and pronouncing upon the effect of, the relevant parts of the schedule. Whether, therefore, it could strictly be described as part of the ratio of the judgments is perhaps less important than the fact that this court undoubtedly did express—and did so deliberately in a reserved judgment—a clear view on the very matter which is now being debated before us.

Mr. Kidwell has referred us to a case in the House of Lords, which has very recently been reported—*Davie* v. *New Merton Board Mills, Ltd.*,[8] in which the House dealt among other things with the significance which should be attached to certain language of Lord Wright in a much earlier case, language on which Jenkins L.J.[9] in this court had strongly relied. As appears, for example, from Lord Reid's [10] speech, that noble Lord concluded that what Lord Wright had said ought to be regarded as obiter, as being not necessarily for the particular decision which he was then expressing. Problems of the extent to which particular reasoning is or is not part of the ratio of the decision sometimes do give rise to difficulty; but putting it at its very lowest, the view which this court took of the effect of the Fourth Schedule was undoubtedly part of its reason for being able to differ from the judge as regards the date without creating as a consequence an anomaly or even worse. I therefore feel, in the present case, no doubt that it is the duty of the court on this occasion to follow the reasoning in the *Cummings* case,[11] and that it would create altogether unjustifiable uncertainties in law if we were now to express a quite contrary view in another, and for all practical purposes entirely analogous, situation.

Whatever, then, be the correct view of the meaning of the Fourth Schedule upon which I have expressed my own inclination, I am quite satisfied that the answer in the present case is that we should regard ourselves as bound to follow the view expressed by this court in the *Cummings* case.[11] That was the view taken by Master Jacob, when the matter first came before him on an application for summary judgment, and it was also the view of McNair J. on appeal from the master. In my view, the master and the judge were both correct in the conclusion at which they arrived, and in conformity with that view it follows that the appeal should, in my judgment, be dismissed.

[7] [1951] W.N. 102.
[8] [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.
[9] [1958] 1 Q.B. 210, 217.
[10] [1959] 2 W.L.R. 331, 358, 359.
[11] [1952] 1 K.B. 327.

PEARCE L.J. I agree with all that my Lord has said. Although the matter is not free from difficulty, I do not feel satisfied by Mr. Kidwell's ingenious argument that the joint effect of the words of section 33 and those of paragraph 4 of the Fourth Schedule defeats the plaintiffs' claim in this case. I do not find it easy to accept the view that paragraph 4 of the Fourth Schedule is limited in its effect to contracts within the proviso to section 33 (1), and that it does not affect the contracts coming within the positive provisions of that subsection. But in any event, the joint effect of those words has been considered by this court in reserved judgments in the *Cummings* case.[11] In my opinion we ought, for the reasons that my Lord has given, to consider ourselves in this case bound by the reasoning and the view expressed unanimously in that case. I would therefore dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Lipton & Jefferies; Markby, Stewart & Wadesons.*

[11] [1952] 1 K.B. 327.

[COURT OF APPEAL.]

THOMSON (INSPECTOR OF TAXES) *v.* MOYSE.

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Jan. 16, 19, 20; *Mar.* 9.
Jenkins, Romer and Pearce L.JJ.

Revenue—Income tax—Foreign income—Remittance to United Kingdom—Cheques drawn in dollars on foreign bank—Purchase by English bankers—Sterling equivalent credited in England—Foreign currency transferred by purchasers to Bank of England—Whether income from foreign securities or possessions—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D,* 1 (*a*) (i), *Cases IV, r.* 2, *and V, r.* 2.

A taxpayer domiciled in the United States of America, but at all material times a British subject resident in the United Kingdom, was entitled to income from the estates of his mother and his father, both estates being situate in the United States. Payments of income from the estates were made by the trustees into an account in the taxpayer's name in the Bank of New York.

The taxpayer carried out the following transactions: (a) he drew cheques in dollars on the Bank of New York in favour of one or other of his bankers in the United Kingdom and requested them to purchase the cheques; (b) his English bankers, as authorised dealers under the Exchange Control Act, 1947, then sold the amount of dollars specified in the respective cheques to the Bank of England and credited to his account in England an amount in sterling equivalent at the then rate of exchange to the amount of dollars specified in the cheques; (c) his bankers then, by registered mail, presented his cheques to the Bank of New York, which honoured the cheques and, on the instructions of his English bankers, transferred the amount of dollars in question in each case to the account of the Bank of England with the Federal Reserve Bank of the United States.

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The taxpayer was assessed to income tax under Cases IV, rule 2, and V, rule 2, of Schedule D to the Income Tax Act, 1918,[1] in respect of these transactions:—

Held (Pearce L.J. dissenting), (1) that the income was not taxable under either rule 2 of Case IV or rule 2 of Case V.

(2) That although for tax purposes sums might be remitted from abroad without the physical transfer of currency, there was no such conception as constructive receipt under the material provisions, and in deciding whether there had been a remittance of money payable in the United Kingdom only the actual form of the transaction was relevant, not its substance.

Hall v. *Marians* (*No.* 2) (1935) 19 T.C. 582 applied.

Scottish Mortgage Company of New Mexico v. *McKelvie* (1886) 2 T.C. 165; *Gresham Life Assurance Society Ltd.* v. *Bishop* [1902] A.C. 287; 4 T.C. 464; *Forbes* v. *Scottish Provident Institution* (1895) 3 T.C. 443; *Kneen* v. *Martin* [1935] 1 K.B. 499; 19 T.C. 33 considered.

(3) That in the present case the income had not been brought to the United Kingdom from abroad and there "received" by or to the order of the taxpayer within the meaning of the relevant rules. In each transaction the only sum received by the taxpayer was the purchase price in sterling of the cheque sold to the English bank. That payment was made in London pursuant to a contract also made there and neither the sterling nor the cheque was a remittance from New York payable in the United Kingdom. Thereafter the English bank acted as a principal and even if ultimately the money received by the English bank was brought

[1] Income Tax Act, 1918, Sched. D.: "1. Tax under this Schedule "shall be charged in respect of—(*a*) "the annual profits or gains arising "or accruing—(i) to any person "residing in the United Kingdom "from any kind of property whatever, "whether situate in the United King-"dom or elsewhere. . . ."

"Case IV.—Tax in respect of in-"come arising from securities out of "the United Kingdom. . . . Case V. "—Tax in respect of income arising "from possessions out of the United "Kingdom. . . ."

"*Rules applicable to Case IV*: 1. "The tax in respect of income arising "from securities in any place out of "the United Kingdom shall be com-"puted on the full amount thereof "arising in the year of assessment, "whether the income has been or will "be received in the United Kingdom "or not. . . .

"2. The foregoing rule shall not "apply—(*a*) to any person who satis-"fies the Commissioners of Inland "Revenue that he is not domiciled in "the United Kingdom, or that, being "a British subject, he is not ordi-"narily resident in the United "Kingdom. . . ."

"The tax in any such case shall "be computed on the full amount, so "far as the same can be computed, "of the sums which have been, or "will be, received in the United "Kingdom in the year of assessment "without any deduction or abate-"ment."

"*Rules applicable to Case V*: . . . "2. The tax in respect of income "arising from possessions out of the "United Kingdom, other than income "to which rule 1 applies, shall be "computed on the full amount of the "actual sums annually received in "the United Kingdom from remit-"tances payable in the United King-"dom, or from property imported, or "from money or value arising from "property not imported, or from "money or value so received on credit "or on account in respect of any such "remittances, property, money, or "value brought or to be brought into "the United Kingdom, on an average "of the three preceding years as "directed in Case I, without any "deduction or abatement other than "is therein allowed."

"3. Rule 1 of the foregoing rules "shall not apply—(*a*) to a person "who satisfies the Commissioners of "Inland Revenue that he is not domi-"ciled in the United Kingdom, or "that, being a British subject, he is "not ordinarily resident in the United "Kingdom . . . and in such cases the "computation shall be made in "accordance with rule 2."

into the United Kingdom (as to which there was no evidence) the taxpayer had no interest in it, and it could not, therefore, be his income for tax purposes.

Timpson's Executors v. *Yerbury* [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155; *Carter* v. *Sharon* (1936) 20 T.C. 229; [1936] 1 All E.R. 720; *Scottish Provident Institution* v. *Farmer* (1911–12) 6 T.C. 34 distinguished.

(4) That the sterling payment was not "money or value arising "from property not imported" within the meaning of rule 2 of Case V. The sterling payment arose in the United Kingdom.

Dicta in *Foulsham* v. *Pickles* [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261 and *Inland Revenue Commissioners* v. *Gordon* (1952) 33 T.C. 226; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866 applied.

Per Pearce L.J. The proceeds of the sale of the cheques remained income notwithstanding the change of form. "Received" for the purposes of Cases IV and V covers transmission in any form known to the commercial world. In the present case a well-established method was used and it was a reasonable business inference that after the sale had taken place foreign income arrived in the United Kingdom. The taxpayer, accordingly, received the income in the United Kingdom when he sold the cheques, and it was immaterial both that the receipt by him was in advance of the actual remittances and that at the time when the transit took place the remittances were not the property of the taxpayer.

Decision of Wynn-Parry J. [1958] 1 W.L.R. 1063; [1958] 3 All E.R. 225 affirmed.

APPEAL from Wynn-Parry J.

The case stated by the Commissioners for Special Purposes of the Income Tax Acts, so far as material, provided:

1. At meetings of the commissioners held on January 23 and 24 and February 1, 1957, Stephen Dickson Moyse (the respondent) appealed against the following assessments to income tax made upon him under Cases IV and V of Schedule D of the Income Tax Act, 1918: (a) Under Case IV for the year 1949–1950 in the sum of £2,335 and for the years 1950–1951 and 1951–1952 in the sum of £2,500 for each year. (b) Under Case V for the year 1949–1950 in the sum of £3,457 and for the years 1950–1951 and 1951–1952 in the sum of £3,500 each year.

The question for determination was whether the respondent was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country.

. . . . .

3. The following facts were admitted or proved:

(a) The respondent was born an American citizen and was and remained domiciled in the United States. At all material times he was a British subject resident in the United Kingdom.

(b) At all material times the respondent was entitled to a life interest in a trust in the United States of America under the will of his father the late Leon Moyse. He was also entitled to a life interest in the residuary estate of his mother, the late Mrs. A. D. Schmucker (widow of the said Leon Moyse) also in the United

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States of America. This estate was in course of administration from August 19, 1943, until April 18, 1951. The income from those two life interests was paid in dollars by the executors and trustees into the respondent's account at the Wall Street, New York, branch of the Bank of New York.

It was common ground that this income, in so far as it arose in the course of the administration of the Schmucker estate, was income arising from securities out of the United Kingdom [section 30, Finance Act, 1938] and that, in so far as it arose from that estate after the completion of the administration and from the Leon Moyse trust, it was income arising from possessions out of the United Kingdom.

(c) Under section 1 (1) of the Exchange Control Act, 1947, the respondent was prohibited from selling, without Treasury permission, the said dollars to any person other than an authorised dealer as defined by section 42 of the Act. By section 2 (1) of the Act, in default of Treasury permission to retain them, he was compelled to offer the said dollars for sale to such a dealer. At no time during the material period did the respondent have permission to sell (otherwise than to an authorised dealer) or to retain the said dollar income the subject of these appeals. Both Seligman Brothers, Merchant Bankers of Austin Friars in the City of London, and the Midland Bank Ltd., were authorised dealers.

(d) Between 1924 and 1926 the respondent trained as a volunteer with Seligman Bros. From his experience in banking the respondent was aware that a practice existed whereby a banker, provided he knew the particular customer, might be willing to purchase outright cheques in foreign currencies drawn on foreign banks. This practice of buying and selling cheques drawn in foreign currencies was a very old established one in the City of London and was part of the normal banking business of Seligman Bros. A banker might be willing to act as a principal in this manner even though he had no knowledge of the state of the customer's account at the foreign bank, provided that he was satisfied as to the customer's integrity. Otherwise he would follow the normal method, used, for example, in the case of cheques drawn in this country on banks in the United Kingdom, and collect the money from the drawer's foreign bank as an agent and credit the customer's account in due course.

(e) Nothing, except as shown in sub-paragraph (i) below, was paid into the respondent's New York bank account other than his income from the aforesaid life interests. For the period relevant to the assessments in question the respondent drew certain cheques in dollars on his New York bank account in favour of either Seligman Bros. or Midland Bank Ltd. (of London).

(f) With each of the four cheques drawn in favour of Seligman Bros. in June, August and December, 1948, and February, 1949, the respondent sent Seligman Bros. a letter

asking them to purchase the cheque and to credit his account with the proceeds in sterling and subsequently to transfer part of the proceeds to the credit of his bank account with Midland Bank Ltd., Kingsway. The letter sent to Seligman Bros. on August 24, 1948 (for example), stated as follows: "I enclose "herewith my cheque on New York in the amount of $6,144.04. "Would you kindly purchase this and credit my sterling account "correspondingly, under the usual advice. Upon completion "of the above, kindly arrange to credit my account with the "Midland Bank Ltd., Kingsway Branch, with the amount of "£1,750 0s. 0d., debiting my account with your goodselves "correspondingly. . . ." The cheque dated February 16, 1949, was enclosed with the following letter to Seligman Bros.: "I "enclose herewith my cheque on New York in the amount of "$7,266.29. Would you kindly purchase this and credit my "sterling account correspondingly, u.u.a. On completion of the "transaction would you kindly arrange to credit my account at "the Midland Bank Ltd., Kingsway Branch, with £1,600 "(Sixteen hundred pounds) u.u.a."

(g) Seligman Bros. purchased the aforementioned four cheques. On receipt of each cheque Seligman Bros. wrote to the respondent using the following form of letter: "We con-"firm having sold for your account today:

"$7,266.29 at 4.03½ producing	£1,800 16s. 4d.
"for which amount, less ⅛% Exchange Commission & stamp and other charges	2 5s. 2d.
i.e.	£1,798 11s. 2d.

"We credit your account val. 18th inst. u.u.r. We have "received the above foreign currency by cheque on New York." The phrase "sold for your account" was used by Seligman Bros. in these letters because during this period Seligman Bros. believed that owing to the exchange control which was introduced under the defence regulations they were not permitted to deal in foreign currency on their own account, but that they were required to act as agents of the Bank of England and to sell either to the Bank of England or to persons holding a permit from the Bank of England. Consequently, the pre-war form of confirmation used by Seligman Bros. "We confirm that we "have bought from you a cheque for . . ." was altered to "We "confirm we have sold for your account." The dollars so purchased were either sold to the Bank of England or to a customer with a permit to purchase dollars from the Bank of England or to a person to whom Seligman Bros. were entitled to deal within the limits set by the Bank of England. The words "We credit your account val. 18th inst." were employed by Seligman Bros. in the above letter in accordance with their usual

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practice whenever they purchased cheques in foreign currency. The foreign currency was valued in sterling on the day following, which in fact would be the actual day upon which the currency would normally be sold by Seligman Bros. on the market or to the Bank of England. The letters "U.U.R.," meaning "under "usual reserve," were always put in any statement by Seligman Bros. whenever they bought or negotiated cheques or bills of exchange. "U.U.R." in no way altered the customer's legal obligation under the contract under the Bills of Exchange Act, 1882, but drew his attention, in case he was not conversant with the legal position, to the fact that recourse could be had to him should any defect be found in the cheque when it ultimately was presented for payment. Seligman Bros. viewed the transactions with the respondent as purchases and sales of currency. They considered that the contracts were for dollars implemented by the respondent handing them a cheque in that currency.

(h) Seligman Bros. employed correspondents in New York to whom they sent all New York cheques acquired by them by registered mail every day. The New York correspondents were instructed by Seligman Bros. to carry out the following transactions in relation to each one of the respondent's cheques: (a) to have the cheque cleared on the respondent's bank in New York; (b) to credit the dollars to Seligman Bros.' bank account in New York; and (c) to pay out of Seligman Bros.' New York bank account so many dollars (as had been sold to the Bank of England) to the Federal Reserve Bank in New York for the credit of the account of the Bank of England. The procedure of the Midland Bank Ltd., was similar to that of Seligman Bros.

(i) A cheque drawn in favour of the respondent by the United States Treasury representing a refund of United States Federal Tax in the sum of $908.19 was received by the respondent through the post from the United States Treasury and forwarded by him to Seligman Bros. on December 8, 1948, with instructions "to convert this into sterling." This particular item was quite distinct from all the other transactions with which this appeal was concerned as the cheque was not drawn on the respondent's bank account in New York. Nevertheless Seligman Bros. adopted the same practice and purchased this cheque crediting the respondent with the sterling equivalent.

(j) On June 16, 1949, the respondent drew a cheque on his New York bank account in favour of the Midland Bank Ltd., in the same manner as previously he drew cheques in favour of Seligman Bros. From and after this date the respondent used the Midland Bank Ltd., for 12 of these transactions during the relevant period from June 16, 1949, to January 29, 1952. No copies of the respondent's letters which accompanied these cheques to the Midland Bank were available except a letter dated January 29, 1952, from the respondent to the Midland Bank as follows: "I am enclosing herewith my cheque on New York in

"the amount of $5,700 and shall be glad if you will credit my "account with the sterling equivalent."

On January 30, 1952, the Midland Bank wrote to the respondent as follows: "We are in receipt of your letter of the 29th "inst. enclosing your cheque on New York for $5,700, and your "account has today been credited with the proceeds, amounting "to £2,045 9s. 10d. This is made up as follows:

"$5,700 at 22.785/16ths	£2,048 1s. 1d.
"*Less* Commission	2 11s. 3d.
	£2,045 9s. 10d."

(k) Neither Seligman Bros. nor Midland Bank Ltd. was aware of the source of the respondent's funds lying in his New York bank account nor did either of the two English banks make any inquiry as to the extent of his resources in the United States. The respondent had been acquainted with the general manager of Seligman Bros. for some 30 years. Seligman Bros. would not purchase a cheque drawn on a foreign bank if the person desiring to sell the cheque was not well known to them as a person of integrity.

(l) Seligman Bros. never made returns to the Exchange Control Committee of the Bank of England showing individual items relating to the respondent. The cheques purchased from the respondent were included with other cheques in the periodical returns which Seligman Bros. as an "authorised bank" were required to make to the Bank of England. Such returns were in a global sum and did not show individual items. A similar practice was followed by the Midland Bank Ltd.

(m) Midland Bank Ltd. bought cheques drawn on New York and in such cases would credit the account of the customer the same day, whereas in cases where they were clearing a cheque (which did not arise in the case of the respondent) it would be a matter of some days before the customer got the credit.

4. It was contended on behalf of the respondent:

(a) that the sums received by the respondent in the United Kingdom arose from contracts concluded in the United Kingdom between the respondent and the respective bank, and that these sums were not remittances of United States income;

(b) that the respondent's United States income was not property received by him in the United Kingdom within the meaning of Case IV and rule 2 of Case V;

(c) that the source of the sterling credited to the respondent's London bank accounts was the sale and purchase as between the respondent and the particular one of the two United Kingdom banks in each transaction.

5. It was contended on behalf of the Crown:

(a) that the amounts of sterling credited to the respondent as

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a result of the cheque transactions in so far as attributable to the estate of the respondent's mother during the period of administration were sums received in the United Kingdom, within the meaning of Case IV, rule 2 of Schedule D;

(b) that the amounts of sterling credited to the respondent as a result of the cheque transactions in so far as attributable to the income from the estate of the respondent's mother after the period of administration or to the income from the estate of the respondent's father were sums received in the United Kingdom within the meaning of Case V, rule 2 of Schedule D.

7. The commissioners gave their decision in the following terms: "The question we had to answer was whether on the "facts of the present case—and we had heard evidence not only "from the respondent but also from eminent bankers—the "respondent was liable to tax under Case IV and Case V of "Schedule D in respect of income from foreign securities and "foreign possessions. The respondent had a bank account in "New York and into that bank account there was credited the "whole of his American income. The respondent gave no "instructions to his New York bank to remit sums of money to "him in the United Kingdom. From time to time the respon-"dent drew cheques in dollars on his New York bank account "in favour of Seligman Bros. or Midland Bank Ltd., which he "asked those banks to purchase from him. At the time of each "such request the respondent instructed the purchasing bank to "place the proceeds in sterling to the credit of his United "Kingdom account. The respondent's requests and instructions "were in every case duly complied with. It seems clear to us "that neither Seligman Bros. nor the Midland Bank Ltd. were "acting as a collecting agent on the respondent's behalf but in "every case acted as a principal, and we so found.

"Evidence had also been given of the transactions which took "place between the purchasing banks and the Bank of England "and the correspondents in the United States. Having regard to "that evidence (which we accepted) and the arguments that had "been addressed to us, we held that no remittances of American "income had been brought into the United Kingdom. Further-"more, on the reasoning employed by Lord Cohen in . . . *Inland* "*Revenue Commissioners* v. *Gordon*,[2] we did not accept the view "that there had been a constructive remittance. Our decision "applied equally to the Case IV assessments as to the Case V "assessments. Accordingly, we held that the appeal succeeded in "principle and we left figures to be agreed between the parties."

On appeal by the Crown from that decision the question was whether on the facts as found by the commissioners there was evidence on which they could properly arrive at their decision, and whether on the facts so found their determination was correct in law.

[2] [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866; 33 T.C. 226.

Wynn-Parry J. dismissed the appeal, holding that the income did not fall within either Case IV, rule 2, or Case V, rule 2. The Crown appealed.

John Foster Q.C. and *Alan S. Orr* for the Crown.

F. N. Bucher Q.C. and *P. J. Brennan* for the respondent taxpayer.

Cases cited in argument not referred to in the judgment: *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Income Tax Commissioners for Trinidad and Tobago* [3]; *Kirkness* v. *John Hudson & Co. Ltd.* [4]; *Fellowes-Gordon* v. *Inland Revenue Commissioners* [5]; *In re Farrow's Bank.* [6]

Cur. adv. vult.

March 9. JENKINS L.J. stated the facts, adding that it was common ground (1) that the income from the mother's estate until administration was complete was assessable under Case IV of Schedule D to the limited extent prescribed by rule 2 of the rules applicable to that case, and (2) that the remainder of the income was assessable under Case V of Schedule D but only to the limited extent prescribed by rule 2 of the rules applicable to that case. His Lordship read the relevant rules and continued:

The essential features common to all the transactions in question appear to have been these: (i) The respondent drew a cheque in his New York bank account for a specified sum in U.S. dollars in favour of the English bank (i.e. Seligman Brothers or the Midland Bank Ltd.). (ii) The respondent delivered this cheque to the English bank with a request that they should purchase it for the sterling equivalent of its amount in dollars at the current rate of exchange. (iii) The English bank acceded to this request, sold a like amount of dollars to the Bank of England or some other permitted purchaser and credited the respondent's account with them in London with the sterling equivalent of the amount of the cheque in dollars at the rate of exchange ruling on the day following their confirmation of the purchase, which would normally be the date of their sale to the Bank of England, or on the permitted market, of the like amount of dollars. (iv) The English bank sent the cheque by registered mail to their correspondents in New York with instructions (a) to have the cheque cleared on the respondent's New York bank account, (b) to credit the English bank's New York bank account with the resulting dollars, and (c) to pay out of the last-mentioned bank account the amount of dollars which had been sold to the Bank of England to the Federal Reserve Bank in New York for the credit of the account of the Bank of England.

[3] [1945] A.C. 1; 61 T.L.R. 30; [1945] 1 All E.R. 9.

[4] [1955] A.C. 696; [1955] 2 W.L.R. 1135; [1955] 2 All E.R. 345; 36 T.C. 28.

[5] (1935) 19 T.C. 683.

[6] [1923] 1 Ch. 41.

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The special commissioners' findings, to a great extent findings of fact, in regard to the character and effect of these transactions are summarised in paragraph 7 of the case stated. [His Lordship quoted from the paragraph which is set out above and continued:]

As to the sums sought to be assessed under Case IV of Schedule D as income received in this country from the mother's estate, the respondent's assessable income from this source is limited to "the full amount . . . of the sums which have been "or will be received in the United Kingdom in the year of assess-"ment . . ." I take it to be plain beyond argument that in order to fall within this description the sum sought to be assessed must not only be received in the United Kingdom but must also be income, and furthermore must be "income arising from secu-"rities out of the United Kingdom" within the meaning of Case IV of Schedule D. This means, I think, that the income in question must originate abroad as the product of securities outside the United Kingdom and be received in the United Kingdom from abroad. Here there is no doubt that income arose to the respondent from his mother's residuary estate under the New York trust to which it was subject, and was received by the respondent as and when it was paid into his New York bank account by the executors or trustees. But it was received by him in New York and not in the United Kingdom and consequently did not attract tax. To make it taxable under Case IV it must be shown to have been in some way brought into the United Kingdom and to have been there received by, or to the order of, the respondent.

Similar considerations apply to the sums sought to be assessed under Case V as income received in this country from the mother's estate since the completion of the administration, and from the father's estate, or in other words as income from possessions of the respondent out of the United Kingdom, though the language of rule 2 of the rules applicable to Case V differs from that of rule 2 of the rules applicable to Case IV, in that it describes the assessable income as the full amount of the actual sums annually received in the United Kingdom from a number of specified sources of which the first, and the only one I need consider at this stage, is "from remittances payable in the United Kingdom."

That expression appears to me to be directed to any sum belonging to the taxpayer and being income from some foreign possession of his which is brought to the United Kingdom from a place outside the United Kingdom by means of a remittance entitling the taxpayer (or some other person to his order) to receive payment in the United Kingdom of the sum in question.

In each of the transactions under review the only sum received by the respondent was the purchase price in sterling of the cheque sold to the English bank, which purchase price was paid to the respondent in London, pursuant to a contract made in London, by the English bank. The commissioners held, and there was, in my view, ample evidence upon which they could hold, that in each case the English bank acted as a principal and not as a

collecting agent, and, in my view, it would be wrong for us to disturb that finding.

The question with respect to each transaction must then be whether by drawing the dollar cheque on his New York account in favour of the English bank, and selling it to the English bank for sterling in London, the English bank acting as principal and not as collecting agent, the respondent received in the United Kingdom out of his bank account in New York the sum of dollars specified in the cheque, converted into sterling at the appropriate rate of exchange. Unless constrained by authority to hold otherwise I would answer that question in the negative.

It is clear that in actual fact none of these transactions involved the transfer of any sum from the respondent's bank account in New York to, or to the order of, the respondent in the United Kingdom. The price in sterling received by the respondent for the cheque from the English bank in London clearly did not come from the respondent's bank account in New York. The amount in dollars received by the English bank on presenting the cheque for payment at the respondent's bank in New York did, of course, come from his account with that bank. But it was received at that bank in New York by the English bank and not by or to the order of the respondent in the United Kingdom. It was no part of the bargain that the amount so received by the English bank should be brought into the United Kingdom, and there is no evidence that it was so brought. If it was, it came to this country as money in which the respondent had no interest whatever, and which, accordingly, could not be his income for tax purposes.

But Mr. Foster, for the Crown, submitted that in each transaction the respondent by drawing the dollar cheque on his account in New York in favour of the English bank, and selling it to the English bank for the equivalent in sterling of its amount in dollars, brought to and received in the United Kingdom from his bank account in New York the sum in dollars specified in the cheque or the equivalent of that sum in sterling.

If my analysis of the facts is correct it seems to me, unless I am compelled by authority to hold otherwise, that this view cannot be supported. I would say that the amount received by the respondent in each case, though no doubt received by him in the United Kingdom, lacked the essential character of a sum brought to the United Kingdom from New York, and neither the sterling sum in question nor the cheque for which it was paid would appear to me to have constituted a remittance from New York payable in the United Kingdom.

Mr. Foster referred us to a number of authorities.

In *Timpson's Executors* v. *Yerbury*,[1] payments by way of gift were made by the taxpayer to her children by means of bills of exchange drawn on London and paid for out of the income

[1] [1936] 1 K.B. 645; [1936] 1 All E.R. 186; 20 T.C. 155.

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standing to her credit in her account with the trustees of a New York trust, under which she had a life interest, and it was held in the Court of Appeal that the amounts so remitted remained her income up to the date of the encashment of the bills of exchange in the United Kingdom on the ground that the amounts of the bills represented incomplete gifts, which she could have revoked at any time before the bills were cashed, and consequently, that she was taxable in those amounts as income to which she was entitled when it reached the United Kingdom. I do not see how this case advances the Crown's argument. It is plain that there were actual remittances of income from New York to the United Kingdom, payable in the United Kingdom, the only question being to whom the income so remitted belonged.

Conversely, in *Carter* v. *Sharon*,[2] the foreign trust in question was governed by Californian law under which the property in a sum remitted to the taxpayer's daughter became the absolute property of the daughter on the posting of the draft in California, with the result that the income brought to the United Kingdom was not income to which the taxpayer was entitled when it reached the United Kingdom. This decision appears to me to assist the respondent on the hypothesis that the proceeds of the cheques in the present case ultimately reached the United Kingdom, but to afford no support to the Crown's argument. As in *Timpson's Executors* v. *Yerbury*,[3] there was clearly an actual remittance from the place abroad to the United Kingdom of the amount of the draft, which was payable in the United Kingdom.

Some reliance was placed by Mr. Foster on *Scottish Mortgage Co. of New Mexico* v. *McKelvie*,[4] where a company formed for the purpose of borrowing money in this country and investing it abroad at higher rates of interest was treated for the purposes of Case IV of Schedule D as having received in this country from America sums which, though in fact raised in this country by the issue of shares and debentures and from depositors, it dealt with in its books here as profits from its American investments and applied as such. That case, now of doubtful authority, was used by Mr. Foster for the purpose of extending to mere book entries the proposition which (within due limits) I fully accept, that funds can for tax purposes be considered as having been remitted to this country from abroad, where the transaction is carried out by debiting a foreign account and crediting an account here by means of a cheque, bill or draft in accordance with ordinary banking procedure, without any actual or physical transfer of currency to this country from abroad.

For the same purpose Mr. Foster referred us to the case in the House of Lords of *Gresham Life Assurance Society Ltd.* v. *Bishop*,[5] where an assurance society included in its yearly statement of accounts in this country interest received abroad but not,

[2] (1936) 20 T.C. 229; [1936] 1 All E.R. 720.
[3] [1936] 1 K.B. 645.
[4] (1886) 2 T.C. 165.
[5] [1902] A.C. 287; 4 T.C. 464.

in fact, remitted to this country, and such interest was held not to have been received in the United Kingdom within the meaning of Case IV. In particular, Mr. Foster relied on the following passage from the speech of Lord Lindley [6]: "My Lords, I agree "with the Court of Appeal that a sum of money may be received "in more ways than one, e.g., by the transfer of a coin or a "negotiable instrument or other document which represents and "produces coin, and is treated as such by business men. Even a "settlement in account may be equivalent to a receipt of a sum "of money, although no money may pass; and I am not myself "prepared to say that what amongst business men is equivalent "to a receipt of a sum of money is not a receipt within the "meaning of the statute which your Lordships have to interpret."

But those observations are subject to this important qualification, conveyed by Lord Lindley in the immediately following words [7]: "But to constitute a receipt of anything there must be "a person to receive and a person from whom he receives, and "something received by the former from the latter, and in this "case, that something must be a sum of money. A mere entry "in an account which does not represent such a transaction does "not prove any receipt, whatever else it may be worth."

I would also refer to this passage from the speech of the Earl of Halsbury L.C.[8]: "Now, here the money has not actually been "received in this country. It is to be observed that the legisla-"ture has assumed, by the distinction which it has made between "the mode of ascertaining the amount payable generally upon "the balance of gains and profits, and the amount taxable in "respect of the interest payable upon foreign investments, that "it has earmarked that sum and made it subject to distinct and "peculiar incidents. The difficulty of identifying the actual sum "is no limit on the enactment. The legislature must be supposed "to have contemplated the possibility of drawing a distinction "between money received in this country and money accounted "for or credited in account. If it were not for the difficulty of "earmarking money, I should think no one would have any doubt "that the money must be received in this country to bring it "within the words of the statute. If it were not money but some "commodity, say tobacco, which a trader carrying on business in "London and Paris was accounting for to his London house, no "one would say that, though the Paris tobacco was credited in "account as a set-off against some expense or something that "the supposed London firm had to set-off against the same claim, "and that as the London firm was paid by the Paris tobacco, "therefore the tobacco was liable to the import duty on tobacco "because it was taken into account in the books of the London "firm.

"In no way that I can give any reasonable interpretation to

[6] [1902] A.C. 287, 296.
[7] Ibid.
[8] Ibid. 291.

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"has the money reached this country or been received in this "country. It, like the tobacco in the case suggested, has not "been imported, and if the legislature had intended that bringing "it into account was to be equivalent to its being received, it "would have been easy to say so. It cannot be said that the use "of artificial meaning to be attached to ordinary language is either "unknown or unusual in legislation; and if it was intended to "make this a special subject of taxation to be taxed whenever "and wherever an equivalent amount was credited or booked or "in any other way recognised as having come under the dominion "of the owner in this country, nothing could have been easier "than to enact it in plain terms."

Lord Macnaghten said [9]: "I do not understand what is "meant by constructive receipt in such a case as this, or how "any sums can be said to have been received in the United "Kingdom unless they have been brought to the United King-"dom, or unless there has been a remittance 'payable in the "'United Kingdom,' to borrow the language of the rule applic-"able to the fifth case."

And [10]: "As my noble and learned friend Lord Robertson, "when Lord President, observed in *Forbes* v. *Scottish Provident* "*Institution* [11]: 'Every man and every company having foreign "'or colonial investments of course knows of the interest arising "'from them, takes note of it, and enters it in any statement "'of affairs which may require to be made up.' But that, as "I think, and as the Lord President thought, is a very different "thing from bringing the interest home—a very different thing "from the receipt of the money here, either in specie or as "represented by a remittance payable in this country."

Lord Macnaghten went on to distinguish the New Mexican case [*Scottish Mortgage Co. of New Mexico* v. *McKelvie* [12]] as a very special case.

Lord Shand (on the same page) said [13]: "It is true that the "appellants received the interest on their foreign securities by "the hands of their agents abroad. But I think it is equally "true that, as they left that interest where it was gained, it "was never received in this country. When it was entered in "the company's balance sheet in order to the ascertainment of "the profits of the year, it was so entered as estate which had "not been received in England, but as property belonging to "the company which they acquired abroad, which had not been "brought home or received here, but which was part of their "foreign assets. Interest on securities in that position was pro-"perly taken into account in the ascertainment of the year's "profits, not because it had been received in England, but be-"cause, although not so received, it was part of assets of value "which the company had acquired and held abroad. In the

[9] [1902] A.C. 287, 292.
[10] Ibid. 293.
[11] 3 T.C. 443, 456.
[12] 2 T.C. 165.
[13] [1902] A.C. 287, 293.

"Scottish case of the investment company of New Mexico, the "species facti was different, for there the company treated the "money as received in this country, and merely saved themselves "the expense of cross remittances. It appeared there that the "company was not entitled to divide the money earned abroad "unless it was received as profits in this country. It was "treated as so received merely to avoid the expense and incon-"venience of cross remittances, money sent home and the same "amount sent back by cross cheques or drafts. That was a "material point in the decision of the case as showing that the "money had been really received in this country."

Lord Brampton said[14]: "My Lords, it is conceded that "no part of the money in question was ever received in the "United Kingdom in specie or in any form known to the "commercial world for the transmission of money from one "country or place to another. But it was argued that if not "actually it was 'constructively' so received in the accounts "of the society. I confess I do not like that expression, nor "do I quite understand what it means. If a 'constructive' "receipt is the same thing as an actual receipt, I see no reason "for the use of the word 'constructive' at all. If it means "something differing from or short of an actual receipt, then "it seems to me that a constructive receipt is not recognised "by the statute, which, in using the word 'received' alone, "must be taken to have used it having regard to its ordinary "acceptation."

At the end of his speech Lord Brampton doubted the correctness of the *New Mexico* case,[15] and expressed the view that if sound it was distinguishable.

A somewhat similar case was that of *Forbes* v. *Scottish Provident Institution*,[16] referred to with approval by Lord Macnaghten in the *Gresham Life Assurance Society's* case.[17] I quote from the headnote[18]: "A Scottish Mutual Life Assurance Society "lends out sums of money in Australia on interest. The interest "accruing is not remitted to the United Kingdom in forma "specifica, but is retained abroad and invested. It is, however, "entered in the revenue account of the society as received. "Held, that interest not received in the United Kingdom is "not assessable to income tax and that the facts in these cases "do not amount to constructive remittance."

Lord Robertson, Lord President, said[19]: "The phrase 'con-"'structive remittance' in the second query in these cases is "one which, if used at all, requires to be carefully guarded. "As employed in the present argument, it would practically "obliterate the limitation in the rule of Case IV."

Immediately after the passage quoted by Lord Macnaghten,

[14] [1902] A.C. 287, 294.
[15] 2 T.C. 165.
[16] (1895) 3 T.C. 443.
[17] [1902] A.C. 287.
[18] 3 T.C. 443.
[19] Ibid. 456.

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the Lord President said [20]: "But this will never make interest "'received in the United Kingdom.' The *New Mexico* case [21] ". . . was totally different. The money there could only be "said not to have been received, if money sent home by bill "is not received in this country, or if no colonial interests are "received in the United Kingdom which do not reach it in "specific form."

In *Scottish Provident Institution* v. *Farmer* [22] a life assurance society invested abroad in bearer bonds income arising from foreign and colonial securities in America, sent the bonds to this country and in due course sold them, the proceeds of sale being received by the society at its head office in this country, and it was held that the bonds were chargeable under Case IV of Schedule D in the year in which they were realised.

Mr. Foster invited us to hold that the cheques drawn by the respondent on his New York bank in favour of the English banks in the present case were equivalent to the bearer bonds in the case just cited and that the proceeds of sale of the cheques received by the respondent from the English banks in the present case were equivalent to the proceeds of sale of the bonds in that case. I cannot agree. The bonds in *Scottish Provident Institution* v. *Farmer* [22] were investments made out of the American income and accordingly in the most direct sense represented that income. They were physically remitted from America to this country, and actually realised here. On the other hand the cheque in each of the transactions with which this case is concerned was an order on the respondent's bank in New York to pay dollars to the English bank in New York out of the funds standing to the credit of the respondent's New York bank account, and the sum in sterling paid by the English bank for the cheque was paid for the right to receive the dollars in New York from the respondent's bank there on presentation of the cheque to that bank. In *Scottish Provident Institution* v. *Farmer* [22] the income was brought to this country from America. In the present case it was not so brought.

In *Kneen* v. *Martin* [23] it was unsuccessfully sought to charge a person resident but not domiciled in this country with tax on sums remitted to this country.

Finlay J. said [24]: "The Attorney-General pointed out, and "pointed out most forcibly, that you might have cases where "income was received and then the income was remitted, not, "of course, in the actual cash or cheque received, but remitted "by the purchase of a bond or some such method as that. I "do not for a moment doubt that if one can see in any par-"ticular case that the sum remitted is income, even though "it has, for purposes of being remitted, changed its form, then "in that event it would remain income and would attract tax.

[20] 3 T.C. 443, 456.
[21] 2 T.C. 165.
[22] (1911–12) 6 T.C. 34.
[23] [1935] 1 K.B. 499; 19 T.C. 33.
[24] 19 T.C. 33, 45.

"Having said that and having indicated, as I do desire to in-
"dicate, that this case to my mind proceeds, as indeed the
"special commissioners thought, very largely upon its own facts,
"upon those facts I agree, on the whole, with the conclusion
"at which they arrived, and therefore this appeal is dismissed."

In the Court of Appeal Romer L.J. said [25]: "I agree. Con-
"sidering, first of all, rule 2 of the rules applicable to Case V,
"the point that has to be determined is whether, when the
"rule refers to the 'actual sums annually received in the United
"'Kingdom,' it means sums representing income or whether it
"means sums whether representing income or representing
"capital. It is to be observed that whether we construe the
"word 'sums' in the one way or in the other, those sums
"are equally capable of being sent to this country in any one
"of the four methods, or the three methods, that are referred
"to in the rule. They can be sent in the form of remittances
"payable in the United Kingdom, or in the form of property
"imported, or in the form of money or value arising from
"property not imported. Those words, therefore, throw no
"light whatsoever on the question of what the meaning of
"the word 'sums' may be."

And later on the same page he said: "I am clearly of
"opinion that the word 'sums' in both rules means, and means
"only, sums representing income."

In *Hall* v. *Marians* (*No. 2*) [26] the facts were complicated, but very briefly they appear to have been of this nature. The taxpayer's wife had an overdraft at the head office of the National Bank of India. She also had an account with the Colombo branch of the bank and that branch held for her certain Indian bonds in which income derived by her from a business carried on in Colombo was invested. The overdraft at the head office of the bank was made on the security of these bonds which, however, remained in Colombo. On her instructions the head office "trans-
"ferred" the overdraft to Colombo (i.e., the amount was credited to her account in London and debited to her account in Colombo) and shortly afterwards the Indian bonds were sold in Colombo and the proceeds applied in paying off her overdraft at the Colombo branch.

It was contended for the Crown that this transaction involved the remittance to this country from Colombo of income in the shape of the proceeds of sale of the bonds, such remittance having been made by the combined effect of the crediting to the lady's account in London of the amount of the overdraft, the debiting to her account in Colombo of the like amount, and the discharge of the resulting overdraft at the Colombo branch by the sale of the Indian bonds. The Court of Appeal, reversing Finlay J.'s judgment, rejected this contention.

Lord Hanworth M.R. said [27]: "To suggest that to attract

[25] [1935] 1 K.B. 499, 514.
[26] (1935) 19 T.C. 582.
[27] Ibid. 597.

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"liability to tax there must be an actual remittance seems quite "to overlook the ordinary transactions of commercial men. The "probability is that if and so far as either goods or bullion pass "from one country to another it is only upon the totality being "reached that it can be shown in favour of which country the "account lies. If a good illustration is wanted of money which "was treated as a remittance although no money had actually "passed, an illustration is found in *Scottish Mortgage Company "of New Mexico* v. *McKelvie*.[28]"

After a citation from that case he said[29]: "That is a very "excellent illustration that it is not necessary that there should "be a remittance. If you are able to treat what is in your hands "as if it were a receipt of income, and if it is used as such, then "it is impossible to prevent the incidence of tax by saying that "in fact it had not been remitted."

I think Lord Hanworth M.R., in view of what he had just previously said, must be taken as meaning here "an actual remit-"tance."

After referring to the facts and to Lord Lindley's speech in *Gresham Life Assurance Society* v. *Bishop*[30] Lord Hanworth M.R. continued[31]: "Upon those facts, is it right to say that there "had been a remittance of a value or a credit in respect of that "debt? Is that the way in which this £2,912 was dealt with; "was it liquidated by a remittance in any form or in any value or "not? The commissioners obviously thought not, and I for my "part cannot find that there was a remittance to or a receipt "of something in the United Kingdom from what, of course, "obviously is a position outside it. Finlay J. came to the con-"clusion that this money was used to extinguish a debt which "was here. That puzzles me rather. What money? It is quite "true that the money which was derived from the bonds when "they were so sold in May was used to liquidate the debt which "at that time had gone out to Colombo, but I find no materials "on which I can say that Mrs. Marians has, in the financial year "ending April 5, 1930, enjoyed the benefit of a remittance within "the many-headed categories which are to be found in rule 2 of "Case V. I find myself unable on any question of law to upset "the decision of the commissioners, which I think they had "abundant material for reaching. I think the right course, there-"fore, is to restore their finding and conclusion as one which they "have come to on the questions of fact and were entitled so to "do, and in respect of which I do not find that they have in any "way misdirected themselves on a point of law."

Romer L.J. said[32]: "In other words, it appears to me that, "if she deliberately adopts a form like this, then she is entitled "to all the benefits that flow from the adoption of such a form and "that we are not entitled to say 'Oh yes, but in substance it is

[28] 2 T.C. 165.
[29] 19 T.C. 582, 597.
[30] [1902] A.C. 287.
[31] 19 T.C 582, 598.
[32] Ibid. 602.

" ' precisely the same thing as though she had adopted the other " ' form and had had income remitted to this country '."

I fear my citations are becoming unduly long, and I will not refer at length to *Paget* v. *Inland Revenue Commissioners*,[33] which is fully cited in the judgment of Wynn-Parry J. I confess to some doubt as to whether it can be said in this case as in *Paget's* case[33] that the price paid for the cheque in each of the transactions now under review was a payment made to the respondent by the English bank for the purchase of a capital asset in the shape of the right to receive part of the income arising from the trusts in the United States. From the English bank's point of view the asset bought was simply the right to receive in New York the amount of the cheque in dollars out of the funds standing to the credit of the respondent's New York bank account. From the respondent's point of view the income paid into that account had already been paid by the persons liable to pay it, namely, the trustees of the United States trusts, and was lying in the bank in New York simply as an accumulation of income already received. I, therefore, prefer to decide this case simply on the issue whether the amount of the cheque in each transaction was ever brought into this country, or in other words remitted to this country from New York.

In a passage from his speech in *Foulsham* v. *Pickles*,[34] cited by the judge, but I think worth repeating, Lord Cave L.C., after reading rule 2 of the rules applicable to Case V, continued[35]: " From this rule it follows that, in order to be taxable under " Case V, an income arising from possessions out of the United " Kingdom must be received in the United Kingdom either " (a) from remittances payable in the United Kingdom, or " (b) from property imported into the United Kingdom, or (c) from " money or value arising from property not imported, or (d) from " money or value received on credit or on account of remittances, " property, money, or value brought to or to be brought into the " United Kingdom. The word ' remittances ' (which recalls the " expression ' remittances from thence ' in the corresponding rule " contained in the Act of 1842) clearly refers to money remitted " into the United Kingdom from outside. The other branches of " the rule all refer to property, money or value imported or " brought into the United Kingdom, and there are no words in the " rule which can comprise money arising and payable here. If so, " the inference is that money so arising and payable is outside the " rule, and so is not taxable under Case V at all."

This passage is of assistance not only as emphasising the general requirement that in order to be taxable under this case the item sought to be taxed must have been brought into the United Kingdom from abroad, but also as indicating that the third

[33] [1938] 2 K.B. 25; 21 T.C. 677.
[34] [1925] A.C. 458; 41 T.L.R. 323; 9 T.C. 261.
[35] [1925] A.C. 458, 464.

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of the sources referred to, viz., "from money or value arising "from property not imported," is not excepted from this general requirement. If that is so, it follows that Mr. Foster must fail in a subsidiary argument raised by him to the effect that in each of the present transactions (so far as the claim in respect of it is based on rule 2 of the rules applicable to Case V), the sterling payment made by the English bank in London for the dollar cheque was income arising from possessions out of the United Kingdom in the shape of a sum received in the United Kingdom from "money or value arising from property not imported" within the meaning of the rule. Clearly, the sterling payment was received by the respondent in the United Kingdom, but clearly, also, it arose in the United Kingdom and was not brought into the United Kingdom from abroad.

This last point was adverted to by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*,[36] where the House of Lords on broadly similar facts came to the same conclusion as had been reached by the Court of Appeal in *Hall* v. *Marians* (*No. 2*).[37] I respectfully adopt the view tentatively expressed by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*.[38] It is fully set out in the judgment of the judge, and I need only cite the concluding sentence: "I incline, therefore, to the view that to succeed under "the rule in respect of sums received from the third source, the "Crown must establish that the money or value had been brought "or was to be brought into the United Kingdom."

I am fortified in my adoption of Lord Cohen's view by the consideration that it appears to me to accord with Lord Cave's analysis of rule 2 of Case V in *Foulsham* v. *Pickles*.[39]

Mr. Foster referred to the Financial Powers (United States of America) Securities Act, 1941, and the United States of America Securities (Income Tax Relief) Regulations made thereunder (S.R. & O. 1941, No. 1563) as throwing light on the construction and effect of the rules applicable to Cases IV and V of Schedule D. Speaking for myself, I have been unable to derive any assistance from this later legislation for the purposes of the matter in hand.

It appears to me that the fallacy underlying Mr. Foster's main argument is this. He said that money can be remitted or brought to the United Kingdom from abroad by creating a credit here and a debit abroad. He said that in each of the present transactions what was done resulted in the respondent being credited by the English bank in London with a sum representing the purchase price in sterling of the dollar cheque, and in the respondent's account with his bank in New York being subsequently debited with the amount of the dollar cheque when presented. He would, therefore, have us conclude that there was a remittance or transfer of the dollars or their sterling equivalent from New York to London. But I fail to see how the transaction, merely because

[36] 33 T.C. 226; [1952] 1 T.L.R. 913; [1952] 1 All E.R. 866.
[37] 19 T.C. 582.
[38] 33 T.C. 237, 239.
[39] [1925] A.C. 458.

it was carried out by means of a credit in London and a later debit in New York, could amount to a remittance or transfer of the dollars or their sterling equivalent from New York to London unless it would have done so if carried out by physical means as opposed to book entries. Suppose A, proposing to visit the United States, wants to have dollars available to him there, and suppose his friend B wants sterling to spend in London, and is possessed of dollars lying in the form of currency in a safe deposit rented to him in New York, both parties being resident here. A and B agree that A shall pay B in London the sterling equivalent of $1,000, and in consideration of such payment B shall give A the key of his safe deposit box in New York with an authority to take from the box $1,000 in currency for his own use and benefit. The transaction is duly carried out, so that A collects from the safe deposit the $1,000, the whole of which he proceeds to spend in the United States. As a result of this transaction have the dollars been remitted or brought into this country? I should say clearly not. A would have bought from B in London under a contract entered into, and for a payment made, in this country, dollars lying in New York, and would have received and spent those dollars in America. Conversely, B would have sold those dollars to A in London under the contract and for the payment so made, the payment arising wholly in this country. The transaction I have supposed appears to me to be as nearly as possible the equivalent of any one of the transactions now in question, carried out by physical means as opposed to book entries, and I do not see why the difference in the machinery adopted should affect the result.

It is, no doubt, true of each of the transactions with which we are here concerned, that substantially the same result was produced as if the English bank had collected the amount of the dollar cheque in New York as agent for the respondent, and had then, as such agent, paid or credited to the respondent in this country the sterling equivalent of the dollars so received, and that if the transaction had taken that form the consequences in point of liability to tax under Case IV or Case V might well have been different.

But this appears to me to be irrelevant. The transaction must for tax purposes be taken as it is. I repeat what was said by Romer L.J. in *Hall* v. *Marians*[40]: "In other words, it appears "to me that, if she deliberately adopts a form like this, then she "is entitled to all the benefits that flow from the adoption of such "a form and that we are not entitled to say 'Oh yes, but in "'substance it is precisely the same thing as though she had "'adopted the other form and had had income remitted to this "'country'."

The contention that these transactions involved in each case a constructive receipt by the respondent in this country from his

[40] 19 T.C. 582, 602.

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bank account in New York of the sterling equivalent of the amount of the cheque in dollars in my view cannot be supported. On this branch of the argument I would respectfully adopt the observations quoted above of Lord Macnaghten and Lord Brampton in *Gresham Life Assurance Society Ltd.* v. *Bishop*[41] and of Lord Robertson Lord President in *Forbes* v. *Scottish Provident Institution*[42] and also those of Lord Cohen in *Inland Revenue Commissioners* v. *Gordon.*[43]

One minor transaction of a different kind from those so far described requires brief consideration. It appears that in December, 1948, the respondent received in this country through the post from the United States Treasury a cheque in his favour for $908.19 representing a refund of United States federal tax and forwarded it to Seligman Bros. with instructions "to convert this "into sterling," which instructions Seligman Bros. carried out by purchasing the cheque and crediting the respondent with the sterling equivalent. It was not seriously disputed that this transaction, which was of a wholly different character from the others, did involve a remittance to this country from the United States of the amount of the cheque sent through the post from the United States Treasury to the respondent in this country.

For the reasons I have endeavoured to state, I am of opinion that on the facts found the special commissioners came to a correct conclusion in law which was rightly upheld by the judge.

Accordingly I would dismiss this appeal.

Romer L.J. In *Foulsham* v. *Pickles*,[44] Lord Cave L.C. classified the ways in which income can be "received" for the purposes of Schedule D, Case V, of the Income Tax Act, 1918. Having referred to rule 2 he said[45]: "From this rule it follows "that, in order to be taxable under Case V, an income arising "from possessions out of the United Kingdom must be received "in the United Kingdom either (a) from remittances payable in "the United Kingdom or (b) from property imported into the "United Kingdom or (c) from money or value arising from pro-"perty not imported or (d) from money or value received on credit "or on account of remittances, property, money, or value brought "or to be brought into the United Kingdom."

Whatever, then, the position may be under head (c) the taxpayer in the present case is not chargeable in respect of his American income except to the extent that it is brought or is to be brought into the United Kingdom in one of the three other ways which Lord Cave specified. This element of importation was referred to by Lord Macnaghten in *Gresham Life Assurance Society Ltd.* v. *Bishop*,[46] as "bringing the interest home" and

[41] [1902] A.C. 287, 292, 294.
[42] 3 T.C. 443, 456.
[43] 33 T.C. 226, 242.
[44] [1925] A.C. 458.
[45] Ibid. 464.
[46] [1902] A.C. 287.

was clearly recognised by Lord Cohen in *Inland Revenue Commissioners* v. *Gordon*,[47] when he said[48]: "It is plain from the "wording of the rule that sums cannot be said to be received in "the United Kingdom from the first, second or fourth sources "unless the source was itself payable in, imported into, or brought "or to be brought into the United Kingdom."

A further principle which it is necessary to bear in mind in the present case was enunciated by Romer L.J. in *Hall* v. *Marians*,[49] as follows: "If, by having capital remitted to this country she "(the taxpayer) escapes payment of income tax, she is entitled "to do so, although in the end she is in precisely the same "financial position as though she had had income remitted. In "other words it appears to me that, if she deliberately adopts a "form like this, then she is entitled to all the benefits that flow "from the adoption of such a form and that we are not entitled "to say 'Oh yes, but in substance it is precisely the same thing "'as though she had adopted the other form and had had income "'remitted to this country'."

Allied to this principle it is well settled that rule 2 only applies where there has been actual receipt of foreign income here; there is no such thing as "constructive receipt" under the rule.

"In those circumstances," said Lord Cohen in *Gordon's* case,[50] "to hold that there was a remittance to London in the "present case would, I think, be to disregard the warnings given "by Lord Halsbury L.C. and Lord Macnaghten in *Gresham Life* "*Assurance Society Ltd.* v. *Bishop*[51] . . . not to be led astray "by an equivalent to a remittance or receipt or a constructive "receipt."

It cannot, I think, be fairly suggested that the sterling credits which Mr. Moyse received from the London banks to whom he sold his American cheques during the relevant years were within heads (b) or (d) of Lord Cave's four categories but the Crown contends that the sums were taxable as remittances payable in the United Kingdom (head (a)) or as money or value arising from property not imported (head (c)).

In the light of the principles to which I have already referred Mr. Moyse is not taxable under head (a) unless upon an analysis of the actual transactions into which he entered with the London banks he is shown to have received, actually and not constructively, American income of his which was brought, or which was to be brought, into the United Kingdom. Unless this is shown he is not taxable upon "remittances"; nor is he so taxable if what he received was no more than the equivalent of a remittance.

It accordingly beomes necessary to examine the form which the relevant transactions took upon the facts as found by the special commissioners. Mr. Moyse had at all material times

[47] 33 T.C. 226.
[48] Ibid. 238.
[49] 19 T.C. 582, 602.
[50] 33 T.C. 226, 242.
[51] [1902] A.C. 287.

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dollars standing to his credit at his New York bank and these dollars represented income which had been paid into his account at that bank by the trustees of certain American trusts under which he was a beneficiary. The New York bank were accordingly debtors to Mr. Moyse in an amount represented by the dollars which from time to time stood to his credit in their books. Mr. Moyse, though domiciled in the United States of America, was resident in this country. Subject to the exchange control regulations he could at any time and in various ways have had his dollars remitted to him or to his order here; and had he done so there can be no doubt but that the dollars so remitted would have been chargeable to tax under Case V. Instead of doing that, however, he drew cheques on his dollar account in the New York bank and sold those cheques to the London banks who paid him for them here in sterling. The special commissioners found that these transactions between Mr. Moyse and the London banks were transactions as between principal and principal and not as between principal and agent; in other words they found (and the finding has not been challenged by the Crown and could not very well be) that Mr. Moyse was the seller of the cheques and the London banks were the buyers. What changes were effected in the position of the various parties concerned as a result of these transactions of sale and purchase? They would appear to be as follows:

(i) Sums of sterling, formerly the property of the London banks, became the property of Mr. Moyse.

(ii) The London banks became entitled to call upon the New York bank to pay them the amount of dollars for which the cheques were drawn.

(iii) The New York bank could and must, on presentation of the cheques, pay those dollars to the London banks instead of paying them to Mr. Moyse.

(iv) So far as Mr. Moyse was concerned each transaction was entirely closed on payment to him of the sterling consideration except in the very improbable event of his cheques being dishonoured in New York.

In these circumstances can it be said that the receipt by Mr. Moyse in London of the sterling sums constituted a receipt by him of American income brought or to be brought into the United Kingdom? The question is not an easy one but for myself I think it must be answered in the negative. Mr. Moyse never directed the New York bank to remit any money to him here either as dollars or in the form of sterling. Nor did he direct the bank to remit the dollars to the London banks in this country as his agents. Had he done so he would no doubt have been taxable on the amounts so remitted (*Timpson's Executors* v. *Yerbury*[52]). The London banks, however, could

[52] [1936] 1 K.B. 645.

(and in fact did) receive payment of the dollars in the United States of America. Eventually no doubt, and via the Bank of England, they received sterling in this country which represented the dollars which they or their agents in the United States of America acquired from the New York bank on presentation of Mr. Moyse's cheques; but by that time the transaction, as I have already said, had been closed so far as Mr. Moyse was concerned and he had no interest whatever in the sterling which was paid by the Bank of England to the London banks, even assuming that the sterling was remitted to this country in one form or another from America. He had in effect assigned his legal right to the dollars to the London banks before any sterling or credit which represented them was brought into this country (compare *Carter* v. *Sharon*[53]).

Accordingly, having regard to the form which the transactions between Mr. Moyse and the London banks took, it does not seem to me that it can be said of the sterling sums which Mr. Moyse received that they were remittances of his American income payable in this country. It has been suggested, however, that these sums are taxable upon a view which was adumbrated in *Hall* v. *Marians* (*No. 2*)[54] by Romer L.J. where he said: "Had the bank in this country allowed her (the taxpayer) to "draw the £440 on account or in advance or in respect of sums "of money that they were expecting to receive in the future "from the bank in Colombo, representing income from her "foreign possessions, the matter would have been different, but "as I understand it this money, the money which she was "allowed to draw from the bank, was a loan from the bank "in its strict sense, and that is found as a fact by the special "commissioners."

I respectfully agree with Lord Cohen in *Gordon's* case[55] in thinking that if the stated hypothesis had been actual fact Romer L.J. would have decided *Marian's* case[56] in the opposite way. I do not, however, think that the observations which I have quoted are applicable to the facts of the present case. There is no reason to suppose that Mr. Moyse ever intended that his American income should be transmitted to him in this country at any time and he never, so far as I am aware, gave any instructions to the New York bank to that effect. So far as the London banks were concerned the commissioners state that these banks knew nothing about Mr. Moyse's American income and were quite unaware that the dollars which they purchased from him represented income of his in the United States of America. In these circumstances it is difficult to see how they were allowing Mr. Moyse to draw sterling sums on account or in advance in the manner indicated by Romer L.J.

In my judgment, therefore, the commissioners and the judge were right in thinking that Mr. Moyse is not taxable under the

[53] 20 T.C. 229.
[54] 19 T.C. 582, 600.
[55] 33 T. C. 226, 240.
[56] 19 T.C. 582.

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first head of Case V, namely, on remittances payable in the United Kingdom; and it only remains to consider whether the sterling sums which he received from the London banks were "money or value arising from property not imported," and taxable as such. As to this Lord Cave L.C. expressed the view in *Foulsham* v. *Pickles* [57] that the "money or value" under this head of charge is confined to money or value which is brought into this country even though the property from which it arises is not. This view was also taken by Lord Cohen in *Gordon's* case [58] and his Lordship gave cogent reasons to support it in his speech, which had the concurrence of Lord Normand. In these circumstances it would not, I think, be right for this court to put a different construction on the relevant language even though we are not in strictness bound by the views which Lord Cave L.C., Lord Cohen and Lord Normand have expressed having regard to the fact that they were obiter. Accordingly, applying these views, Mr. Moyse is not chargeable under the third head of Case V; and as he is not, in my opinion, chargeable under the first head I would dismiss the appeal.

Pearce L.J. It is with the greatest diffidence that I express a view contrary to that of Jenkins and Romer L.JJ. I take some comfort from the thought that the solution of the problem can hardly be said to be obvious. For if the view which the respondent puts forward is correct it seems that for over a century many persons have without protest paid tax for which they were not liable; and during that period the fact that tax liability under Cases IV and V can be avoided by a simple, normal and legitimate transaction has escaped the observation of the eagle-eyed.

The transactions in debate are those by which the respondent used for the purposes of living in England the income which was paid in dollars into his New York bank. He had many such dealings both with the Midland Bank in London and Seligman Bros. who are merchant bankers in the City of London. For convenience I will refer to them as "the English bank."

The respondent sent or presented to the English bank a cheque for dollars drawn on his New York bank account. The English bank bought the respondent's cheque, viewing the transaction as a purchase of dollars, and credited the respondent's account on the same or following day with the sterling equivalent of the dollars at the prevailing rate of exchange. Had the English bank been clearing the cheque by collecting it on the respondent's account the credit would not have been made until some days later. It is conceded that in that case the respondent would have been liable to tax. In this case the bank was not acting as a collecting agent but dealing as principal with principal in a purchase of dollars.

[57] [1925] A.C. 458. [58] 33 T.C. 226.

The case finds that this practice of buying and selling cheques drawn in foreign currencies is a very old-established one in the City of London and is part of the normal banking business of the English bank.

The respondent was prohibited by the Exchange Control Act, 1947, from selling dollars to any person other than an authorised dealer such as was the English bank. Having sold his cheque the respondent was no longer concerned with it, save insofar as he would have been liable had it been dishonoured.

The English bank who had thus become holders for value sent the cheque to their New York correspondents, who had it cleared on the respondent's New York bank, credited the dollars so received to the English bank's account with them, and paid the dollars out of that amount to the Federal Bank in New York for the credit of the Bank of England to whom the dollars had been sold. The case is silent as to how, when or where the Bank of England paid to the English bank the sterling proceeds of the dollars.

Thus, the transaction consisted in the respondent selling for sterling in England dollar cheques drawn on his American income lying in a bank in New York. If that simple description is adequate, it would at first sight appear that he had to that extent received his American income in the United Kingdom, when one gives to the word "receive" its ordinary meaning. But one has to investigate the transaction more narrowly and consider the meaning of the word "receive" as defined by the cases. Without disregarding the substance of a commercial transaction one has to consider its technical and exact form. Lord Simonds observed in *St. Aubyn* v. *Attorney-General*[59]: "The question is "not at what transaction the section is, according to some alleged "general purpose, aimed, but what transaction its language, "according to its natural meaning, fairly and squarely hits."

The English bank bought the cheque on the basis that the dollars would be paid out of the respondent's account at the New York bank on which the cheque was drawn by him. It can, in my view, hardly be said (as Mr. Bucher for the respondent argued) that there was no nexus between the respondent's dollars in his New York account and his sterling in England. He bought the latter with the former. In *Gresham Life Assurance Society* v. *Bishop*[60] Lord Brampton said[61]: "It is conceded that no "part of the money in question was ever received in the United "Kingdom in specie, or in any form known to the commercial "world for the transmission of money from one country or place "to another."

It seems clear that, in his view, money transmitted in any form known to the commercial world to the United Kingdom from another country would have been "received" in the United Kingdom. Here the respondent wished to have for use in the

[59] [1952] A.C. 15, 32.
[60] [1902] A.C. 287.
[61] Ibid. 294.

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United Kingdom in sterling the income which was lying in dollars in the United States. That necessitated some form of transmission. He achieved it by a normal and old-established commercial method.

But Mr. Bucher argues that to constitute a receipt in the United Kingdom within Cases IV and V: (a) there must be importation of something of value, and (b) that importation must be income or represent income (for both those points he relies on *Hall* v. *Marians (No. 2)* [62] and *Gordon's* case [63]). And (c) the thing imported must belong to the taxpayer at the time of importation (for this point he relies on *Timpson's Executors* v. *Yerbury* [64] and *Carter* v. *Sharon* [65]).

In this case, he argues, the blank cheque which the respondent brought to this country was itself worthless, the dollars never were imported into this country, and the fruit of his cheque, if it came back at all to this country, certainly did not belong to the respondent when it did so, since the respondent had already sold it.

He also argues that the dollar income of which the respondent sold part ceased to be income when it was sold and became capital: *Paget* v. *Inland Revenue Commissioners*.[66]

It is convenient to deal first with the question whether the American income of the respondent remained income after it was sold so that the proceeds of the sale were income. Undoubtedly the dollars in the American bank were income. But the proceeds of a sale of income may, in certain cases, constitute capital as, e.g., on the sale of annuity. The mere fact, however, that the income may alter in form does not prevent it retaining the quality of income. See *Scottish Provident Institution* v. *Farmer*,[67] where bearer bonds were bought abroad out of income and, when they were brought to this country and sold, the proceeds of sale were held to be income.

In *Paget* v. *Inland Revenue Commissioners*,[68] Miss Paget held Hungarian bearer bonds, the interest coupons of which were payable in London in sterling, and in certain other countries in the respective currencies of those countries. By a decree the Hungarian Government directed that the interest on the bonds should not be paid direct to creditors, but that its equivalent in pengos should be deposited with the Hungarian National Bank and placed in a foreign creditors' fund, out of which bond-holders might obtain payment of interest coupons in pengos, but only for use for certain purposes in Hungary. Miss Paget did not obtain payment in this way, but sold coupons, after they had fallen due, through coupon dealers in London, who deducted income tax on payment to her of the proceeds of such sales.

Miss Paget also held bearer bonds of the kingdom of Jugo-

[62] 19 T.C. 582.
[63] 33 T.C. 226.
[64] [1936] 1 K.B. 645.
[65] 20 T.C. 229.
[66] [1938] 2 K.B. 25.
[67] 6 T.C. 34.
[68] [1938] 2 K.B. 25.

slavia the coupons of which were payable in American dollars in New York. The Jugoslav Government gave notice of its inability to pay the interest in full and offered a composition either by payment in "blocked" dinars in Belgrade or by payment of 10 per cent. of their face value in dollars and by the issuing of funding bonds for the balance. Miss Paget did not accept this scheme but sold the interest coupons as in the case of the Hungarian bonds.

The Court of Appeal held that neither in the case of the Hungarian nor the Jugoslav bonds did the proceeds of the sale of coupons received by Miss Paget constitute income.

In neither case had the income passed to Miss Paget's hands nor was it at her disposal. On the Jugoslav bonds she was offered a choice between two methods of composition. In respect of the Hungarian bonds a sum of pengos representing interest of bond-holders (but only for use in Hungary) had been deposited in the Hungarian bank. That bank was not her agent to accept the deposit of such pengos on her account and though she could have got them if the Hungarian bank had sanctioned it, the income in the form to which she was entitled on the original terms of the bonds was not available to her.

Greene M.R. said [69]: "The purchase price received by Miss "Paget was not income arising from the bonds at all. It arose "from contracts of sale and purchase whereby Miss Paget sold "whatever right she had to receive such income in the future, "as well as her right to take what was offered by the defaulting "debtors."

MacKinnon L.J. said [70]: "In both these cases the foreign "debtors had defaulted, and refused to pay the interest promised "by their bonds. Budapest offered to pay instead a certain "amount of pengos which could only be enjoyed as currency "within the limits of Hungary. Jugoslavia offered instead to "pay in dinars, or partly in dollars and partly in funding bonds. "What Miss Paget sold was the possibility of making more "money abroad upon the acceptance of these offers."

The coupons sold by Miss Paget did not represent income lying at her disposal. In my view the sale of rights to future interest and compositions offered by defaulting debtors is wholly different from the sale in our case of the respondent's income lying at his disposal in the bank. No other case was cited to us on this point. I think that that case is clearly distinguishable. Here the dollars constituted income before they were sold for sterling and the sterling proceeds were also income.

It is interesting to note that if the respondent's contention on the major point in the case before us is correct the sums realised by Miss Paget could not in any event have been received by her in the United Kingdom within the meaning of Case IV, since the foreign income in that case could not itself be brought into this country. But the case was not dealt with on those lines.

[69] [1938] 2 K.B. 25, 35. [70] Ibid. 48.

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In dealing with the main point, namely, whether there was a receipt of his income by the respondent in this country, both sides relied on *Timpson* v. *Yerbury*.[71] In that case the taxpayer, who was resident in the United Kingdom, was a life tenant of income in New York. She directed the trustees in New York to pay allowances to her children living in the United Kingdom out of her interest in the income of the trust. They accordingly sent bills of exchange drawn on London either to the children or their bankers in the United Kingdom and debited the taxpayer's account with the equivalent in dollars of the sterling value of the bills.

It was held by the Court of Appeal that the amounts so remitted remained income of the taxpayer up to the date of the encashment of the bills of exchange in the United Kingdom and were, therefore, received by her there.

Lord Wright M.R. said[72]: "In fact it came in equity and in "the way I have stated as her income; however she chose to "apply it, whether to payment of debts or in purchase of valuable "things or services or as a voluntary allowance, it was income "of hers to which she was entitled. Actual receipt by her would, "I think, be too narrow a condition of chargeability: no one "would doubt that she should in fairness be charged where the "income was applied in the country to the discharge of debts "or the acquirement of valuable things or interests, but I find "it difficult to bring such payments any more than gratuitous "payments like the payments in question within the charging "rule, if that rule is limited to cases where there is actual receipt "in this country by the taxpayer personally. But the test that "the taxpayer should be entitled to the income (provided, as I "here assume, that it comes as her income), whether she actually "receives it or not, appears to me to be in accordance both with "the language and the intent of the rules. Rule 1 of the mis-"cellaneous rules applies to all cases under Sch. D and is aptly "framed, and is, I think, effective, to charge all income of the "taxpayer though the taxpayer never handles it himself, because "he applies the income before it reaches him, so that he never "actually receives it, though he disposes of it. What rule 2 of "the rules applicable to Case V, read with rule 1 of the miscel-"laneous rules, requires is that the actual sums of the taxpayer's "income should at least come to this country under such circum-"stances that the taxpayer, if he does not actually receive them, "is entitled to them, and these conditions were fulfilled in the "present case. I reserve for further consideration, in case the "question should ever arise, the question whether if income "accrues abroad either qua legal estate or qua equitable estate "to a taxpayer resident in this country, rule 2 of the rules "applicable to Case V and rule 1 of the miscellaneous rules "would make the taxpayer liable to charge, even though the "taxpayer disposed of his interest in that income before it was

[71] [1936] 1 K.B. 645. [72] Ibid. 661.

"received in the United Kingdom, so long as the actual sums "of that income were in fact received by the alienee in this "country."

Romer L.J. said [73]: "In computing the tax, therefore, sums "paid to third parties for the benefit or at the request of the "party so entitled have to be taken into account; and this is "only what one would expect."

Greene L.J. said [74]: "If this view be correct the fact that "the actual hands to receive in this country the money derived "from the remittances were those of the children appears to me "to be irrelevant, since provided the income in respect of which "the assessment is made is income to which the person assessed "is entitled, it is, in my judgment, immaterial whether the sum "'received in the United Kingdom' is received by him or by "some third party upon his instructions."

In *Carter* v. *Sharon* [75] the question reserved by Lord Wright M.R. arose for decision. The facts were similar to those in *Timpson* v. *Yerbury*,[76] save that the gifts were made by bankers' drafts which by Californian law passed irrevocably to the donee at the latest when the drafts were posted in California. Lawrence J. distinguished the case from *Timpson* v. *Yerbury* [76] on the ground that in the latter case the Court of Appeal decided that the allowances to the deceased's children only became complete upon the receipt and encashment of the bills of exchange by the children, and that therefore at the time the income or the money came into the United Kingdom it was income to which Mrs. Timpson was entitled; whereas in the case before him the money had ceased to belong to the donor at the time when it came into the United Kingdom, and therefore she did not receive it in the United Kingdom.

The principle in those two cases is clear in so far as it applies to transactions of the kind that were there being considered; but the bearing of those cases on the transaction which we have to consider is not so clear. Mr. Bucher relies on them as showing that the money must belong to the taxpayer when it actually crosses the Atlantic. Mr. Foster contends that, as in *Timpson* v. *Yerbury*,[76] there was a complete gift completed when the donee cashed the bill of exchange, so in the case before us the dollars in the cheque were brought into the country when the respondent signed the cheque and were the property of the respondent until the bank actually cashed (or paid for) the cheque. If the taxpayer in *Timpson* v. *Yerbury* [76] received a bill of exchange when her child received and cashed it, a fortiori he argues, when the respondent cashed (i.e., received cash for) the cheque for himself, he must have received it.

In *Gresham Life Assurance Society* v. *Bishop* [77] the House of Lords held that interest on an investment abroad could not

[73] [1936] 1 K.B. 645, 663.
[74] Ibid. 668.
[75] 20 T.C. 229.
[76] [1936] 1 K.B. 645.
[77] [1902] A.C. 287.

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be held to be remitted to this country merely because it was included in an English insurance company's yearly accounts for the purpose of the triennial valuation on which profits were estimated.

Earl of Halsbury L.C. said [78]: "I do not think any amount "of bookkeeping or treatment of these assets wherever they may "be will be equivalent to or the same thing as receiving the "amount in this country. The words are simple, intelligible, "and represent an ordinary and simple thing. I cannot think "we ought to go beyond the words themselves."

And Lord Macnaghten said [79]: "I do not understand what "is meant by constructive receipt in such a case as this, or how "any sums can be said to have been received in the United "Kingdom unless they have been brought to the United King-"dom, or unless there has been a remittance payable in the "United Kingdom to borrow the language of the rule applicable "to the fifth case."

It is true that in *Scottish Mortgage Co. of New Mexico* v. *McKelvie* [80] book entries had been held to constitute a receipt when they were made to obviate the necessity of cross-remittances. Lord Macnaghten explained [81] the case in this way: "In that case, as it seems to me, in the transmission to this "country of money which the company was bound to reinvest, "the company acted as their own bankers and did for themselves "by an entry in their books what might have been done less "conveniently and less economically by an ordinary bank or "financial agent on their behalf."

Lord Lindley described [82] the case as "very peculiar. Money "received by the company's agents abroad was remitted to and "received by it here, and money here was treated by the com-"pany as remitted abroad in exchange for it. The exchange was "effected by a book entry but that entry was the business mode "of carrying out cross-remittances which it would have been "unbusinesslike and really childish to have effected in any other "way. But thinking as I do that McKelvie's case may be "properly upheld, I am not prepared to adopt it as a new starting "point for further inferences."

In *Hall* v. *Marians* (*No. 2*) [83] the facts are far removed from the facts of the case before us. The respondent's wife, living in London, was entitled to a share of profits of a business at Colombo. Those profits were paid to her account with the Colombo branch of a bank whose head office was in London and were invested in Indian bonds. From time to time she had borrowed moneys from the London branch on the security of the bonds. The amount of her loan account was debited to the Colombo branch which was instructed to realise securities to pay it off. The transfer was effected by cross-entries in the books of

[78] [1902] A.C. 287, 292.
[79] Ibid.
[80] 2 T.C. 165.
[81] [1902] A.C. 287, 293.
[82] Ibid. 298.
[83] 19 T.C. 582.

the two offices. A few weeks later the overdraft was discharged in Colombo out of the proceeds of the Indian bonds. Assessments under rule 2 of Case V were made on the ground that the extinction of the debt due to the bank by crediting the proceeds of the bonds constituted a receipt by the wife of a taxable remittance either when the advances were made or when her loan was transferred to Colombo. The Court of Appeal held that there had been no remittance to this country.

Lord Hanworth M.R. said [84]: "As I read rule 2 of Case V "it clearly indicates that there must have been in one form or "another something which amounted to a sum received in the "country."

After reading the rule he continued [85]: "To suggest that to "attract liability to tax there must be an actual remittance seems "quite to overlook the ordinary transactions of commercial men. "The probability is that if and so far as either goods or bullion "pass from one country to another it is only upon the totality "being reached that it can be shown in favour of which country "the account lies. If a good illustration is wanted of money "which was treated as a remittance although no money had "actually passed, an illustration is found in *Scottish Mortgage "Co. of New Mexico* v. *McKelvie*.[86] There there was a sum "lying outside this country of £500; there was a sum lying over "here of £500. The sum which was lying in this country was "treated as being income received, and the transaction was "wisely carried out without any remission of money, or, indeed, "drafts from one side to the other."

After quoting some observations of the Lord President, he continued [87]: "That is a very excellent illustration that it is not "necessary that there should be a remittance. If you are able "to treat what is in your hands as if it were a receipt of income, "and if it is used as such, then it is impossible to prevent the "incidence of the tax by saying that in fact it had not been "remitted."

He later quoted from Lord Lindley's words in *Gresham Life Assurance Society* v. *Bishop* [88]: "A sum of money may be "received in more ways than one, e.g., by the transfer of a coin "or a negotiable instrument or other document which represents "and produces coin, and is treated as such by business men. "Even a settlement in account may be equivalent to a receipt "of a sum of money although no money may pass; and I am "not myself prepared to say that what amongst business men "is equivalent to a receipt of a sum of money is not a receipt "within the meaning of the statute which your Lordships have to "interpret. But to constitute a receipt of anything there must "be a person to receive and a person from whom he receives,

[84] 19 T.C. 582, 596.
[85] Ibid. 597.
[86] 2 T.C. 165.
[87] 19 T.C. 582, 597.
[88] [1902] A.C. 287, 296.

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"and something received by the former from the latter, and in "this case that something must be a sum of money."

Romer L.J. said [89]: "It was suggested, I think, by Mr. Hills "in his argument that, having so borrowed it on the security of "sums representing her income in India, that was a sum which "must be deemed to have been or which was received by her in "the United Kingdom 'on credit or on account in respect of any "'such remittances,' and so on, as mentioned in the rule; in "other words, that the sum so borrowed was a sum received in "this country within the meaning of rule 2. I do not myself "take that view. Had the bank in this country allowed her to "draw the £440 on account or in advance or in respect of sums "of money that they were expecting to receive in the future from "the bank in Colombo, representing income from her foreign "possessions, the matter would have been different, but, as I "understand it, this money, the money that she was allowed "to draw from the bank, was a loan from the bank in its strict "sense."

It appears that Romer L.J. in the words I have read held the view that it was immaterial that the English resident received the money in advance and that the remittance came into the country at a later date. It seems to me with respect that that view is correct. If one applies Romer L.J.'s hypothesis to the case before us, the respondent would have been taxable if he had borrowed the sterling from the English bank "on account or in "advance or in respect of sums of money that they were expect-"ing to receive in the future in London from the bank" in New York, representing income from his foreign possessions. If that be so, it would be a strange proposition to hold that, because instead of borrowing he bought the sterling by giving to the English bank the certainty (instead of the expectation) that they would receive the price from his New York income, he is *not* taxable—always provided that the English bank in fact ultimately received the proceeds of the cheque here.

And in the same case Maugham L.J. said [90]: "Liability to "tax therefore depends on the locality of the receipt; in other "words the liability in respect of the sums received whether they "are from remittances or from property imported or money or "value from property not imported or from the credits, mentioned "in the fourth possible method of remittance depends on the "place in which in a reasonable business sense the sums are "received."

Those words of Maugham L.J. are, in my view, important. The divergence of view in this case comes largely from differing views as to "the place in which in a reasonable business sense "the sums are received."

In a subsequent case, *Inland Revenue Commissioners* v. *Gordon*,[91] a similar transaction with regard to the transfer of

[89] 19 T.C. 582, 600.
[90] Ibid. 602.
[91] 33 T.C. 226.

overdrafts was considered. The House of Lords, like the lower courts, held that it was difficult to distinguish the case in any material respect from *Hall* v. *Marians* (*No. 2*),[92] and held that the transaction did not come within Case V. Lord Cohen[93] specifically dealt with the hypothesis of Romer L.J. to which I have referred and says: "Mr. Tucker" (for the Crown) "read "this passage as meaning that if the stated hypothesis had been "actual fact, Romer L.J. would have decided the case in the "opposite way. Romer L.J. does not express a concluded opinion "but I think it is a fair inference that he would have done so. "Even so I do not think his observations help Mr. Tucker, since "in the present case I am unable to trace any finding of fact that "the bank in England ever made the loan on account of or in "advance or in respect of money of the respondent representing "income which the bank were expecting to receive in England "from the branch in Colombo."

It will be seen that none of the cases deals with a transaction of precisely this nature. The principles which, as it seems to me, can be deduced from the cases to which I have referred are these. First, to bring a transaction within Case IV as received in the United Kingdom or Case V as received in the United Kingdom from remittances payable in the United Kingdom, income from abroad must have come to this country. Secondly, that income must have been received in this country by the taxpayer. It must therefore at some time in this country be in the possession of or at the disposal of the taxpayer. If he can direct its disposal he receives it in the person of the alienee. Thirdly, that money may have come to this country in one of the ways in which money does come to a country in a commercial sense. It need not, of course, come in specie. It may, I think, start as dollars and arrive as pounds sterling. It may come by the transfer of a credit from a foreign bank or branch to an English bank or branch. But there must be such a transfer. Fourthly, the fact that the taxpayer receives the fruit of the income before its arrival is immaterial provided the income does in fact arrive: see Romer L.J.'s hypothesis. And in such a case it need not, as it seems to me, be his property when it arrives, since he has received the proceeds of it and directed the transfer.

It is true that *Timpson* v. *Yerbury*[94] and *Carter* v. *Sharon*[95] would at first sight appear to be authority for saying that the remittance must belong to the taxpayer when it actually comes into this country. On the facts of that case there would not otherwise have been any receipt at all in this country, since there had been no receipt in advance by the taxpayer. But in a case where the taxpayer receives the proceeds in advance on condition that the income itself arrives to reimburse the person who has lent such proceeds to the taxpayer or paid them as purchase price, I cannot see that principle demands that the remittance

[92] 19 T.C. 582.
[93] 33 T.C. 226, 240.
[94] [1936] 1 K.B. 645.
[95] 20 T.C. 229.

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should actually be the property of the taxpayer at the time of transit. So to hold would be departing very far from the ordinary sense of the words "received in the United Kingdom," and I should be loth to do so unless compelled by authority. In my view no authority so compels me.

Applying these principles to the case before us, I think that the respondent by selling for sterling in London a cheque drawn on his foreign income received it in the United Kingdom, if it be shown that the foreign income later arrived in the United Kingdom. It need not arrive in dollars; it may arrive in pounds. It may arrive in any manner in which money is transmitted by banks. Nor need it be identified among a mass of banking transactions if the reasonable business inference is that it did so arrive. See the words of Lord Hanworth M.R. in *Hall* v. *Marians (No. 2)*[96]: "The probability is that if and in so far as either "goods or bullion pass from one country to another it is only "upon the totality being reached that it can be shown in favour "of which country the account lies."

The Bank of England bought the dollars. The proceeds of them must, I think, have been a sterling credit to the English bank standing in the books of the Bank of England. I have felt some doubt as to whether that is an inference one may rightly draw, but any other inference seems quite impracticable. As I understand the case, the whole transaction was based on the known fact that the English bank would have to sell the dollars to the Bank of England and out of the proceeds of that sale would recoup itself for the price paid for the cheque.

Thus the circle was complete. The English bank had in the United Kingdom from the respondent's dollars the sterling equivalent which (with a small profit to them) represented the sterling that they had already paid to the respondent. In my view, the respondent has received the relevant income in the United Kingdom within the meaning of Case IV. He has also, in my view, received the income from remittances payable within the United Kingdom within the meaning of Case V.

It was common ground to both counsel that the effect of Case IV and Case V on the transaction which we have before us is identical and that they can find no case where it has been held that the effect of the two cases differs.

While Case IV gives no particulars as to what is meant by "received," Case V gives particulars. Rule 2 of Case V, which has been already read by my Lord, provides that the tax shall be computed on the full amount of the actual sums annually received in the United Kingdom under four heads—(*a*) from remittances payable in the United Kingdom, or (*b*) from property imported, or (*c*) from money or value arising from property not imported, or (*d*) from money or value so received on credit or on account in respect of any such remittances, property, money, or

[96] 19 T.C. 582, 597.

value brought or to be brought into the United Kingdom. (I have inserted the letters for convenience of reference.)

Mr. Foster claims that in any event the relevant transactions must in the last resort come within the terms of (*c*) above, namely, the respondent's transaction must constitute a receipt in the United Kingdom of money or value arising from property not imported. He contends that the words mean that the money or value can arise in this country and need never have been brought into it at all.

Mr. Bucher argues that one should read into the words the condition that the money or value must itself have been imported. The words are not easy to construe.

Historically these two heads of charge originated in Mr. Pitt's Income Tax Act, 1799. They figure in that Act as:

"17th Case. *1st from foreign possessions.* The full amount "of the actual net income received in Great Britain . . ." (there follow directions as to periods of assessment).

"18th Case. *2nd Money arising from foreign securities.* The "annual income of such securities if the same were existing in "the preceding year to be estimated . . ." and so forth.

In the Income Tax Act, 1803, the Cases became Schedule D, Cases IV and V.

"4th Case. The duty to be charged in respect of interest "arising from securities in Ireland, or in the British plantations "in America, or in any other of His Majesty's Dominions out of "Great Britain, and foreign securities.

"The duty to be charged in respect thereof shall be computed "on a sum not less than the whole and just sum and sums (so "far as the same can be computed) which have been or will be "received in Great Britain, in the current year, without any "deduction or abatement.

"5th Case. The duty to be charged in respect of possessions "in Ireland, or in the British plantations in America, or in any "other of His Majesty's Dominions out of Great Britain, and "foreign possessions.

"The duty to be charged in respect thereof shall be computed "at not less than the full amount of the actual sums annually "received in Great Britain, either for remittances from thence "payable in Great Britain, or from property imported from "thence into Great Britain, or from money or value received in "Great Britain, and arising from property of any person or per-"sons, which shall not have been imported into Great Britain, "computing the same on an average of the three preceding years, "as directed in the first case, without deduction or abatement."

The Income Tax Act, 1842, made no alterations material to the argument before us save that in that Act in Case V there appear for the first time the concluding words (namely (*d*)): "or "from money or value so received on credit or on account in "respect of such remittances property money or value brought "or to be brought into Great Britain."

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The Income Tax Act, 1918, re-enacted words similar in material respects save that in rule 2 of Case V the words "from "thence" are omitted in two places (namely, in (*a*) and (*b*)).

If the matter were free from authority I should incline to the view that money or value under (*c*) need not be imported for the following reasons.

First, in the Act of 1803 the words in (*c*), namely, "arising "from property of any person or persons which shall not have "been imported," do not contain the words "from thence" after the word "arising," whereas (*a*) and (*b*) do contain the words "from thence." This seems to show that the legislature, while intending that in (*a*) and (*b*) importation should be connoted, did not so intend in (*c*).

Secondly, in the Act of 1803 and thereafter the use of the word "arising" is far more apt to indicate something whose origin was in this country than something brought into it. It is the antithesis, as it seems to me, of "imported" in this context.

Thirdly, having dealt under (*a*) with remittances and under (*b*) with property imported, it would be natural to go on to deal with the case of the person who did not have the proceeds from the sale of his crop of sugar in the plantations remitted to him here, and who did not import his crop of sugar and sell it here, but who sold it in this country to some purchaser who would dispose of it abroad or import it at some later date. He would thus be receiving income arising from property not imported. Receipt of the money in this country, not its importation into it, would be the test of (*c*). The tax would then have a coherent framework instead of having an obvious and illogical loophole.

Fourthly, if (*c*) only deals with money or value which has itself been imported, it adds nothing to (*a*) and (*b*), which covers money imported and property imported. Moreover, if the money or value referred to in (*c*) is only that which has been imported, there cannot be any relevance in considering whether it came from property not imported or any other income source.

Fifthly, the Act does not say that the money or value has to be imported. I do, however, appreciate that the words of (*d*) as a matter of construction definitely point in a contrary direction. But it is hard to believe that they were inserted in the Act of 1842 (and, thereafter, in the Act of 1918) with a view to altering the meaning of (*c*), so as to impose the connotation that the money or value must be imported and create the loophole to which I have referred. Had this been intended, it could have been clearly expressed in two or three words.

For the above reasons I do not myself see the need or justification for reading into (*c*) words which it does not contain. But opinions have been given obiter on the words of (*c*).

Viscount Cave L.C., after setting out the words of the rule,

said in *Foulsham* v. *Pickles* [97]: "The word 'remittances' (which "recalls the expression 'remittances from thence' in the cor- "responding rule contained in the Act of 1842) clearly refers to "money remitted into the United Kingdom from outside. The "other branches of the rule all refer to property, money or value "imported or brought into the United Kingdom, and there are no "words in the rule which can comprise money arising and pay- "able here. If so, the inference is that money so arising and "payable is outside the rule, and so is not taxable under Case V "at all."

This view was expressed obiter and was not part of the ratio decidendi of the case, since rule 2 was held on other grounds clearly inappropriate to the facts which were there considered.

Lord Cohen, in *Inland Revenue Commissioners* v. *Gordon*,[98] said: "At one time Mr. Tucker, who appeared for the appellants, "suggested that it might be said that there were sums received "in the United Kingdom from 'money or value arising from "'property not imported,' but I think that he ultimately recog- "nised that it was impossible to bring this case within the third "source without grossly distorting the language used and, in "particular, without placing on the word 'from' a meaning "which it could not properly bear.

"There might have been another difficulty in Mr. Tucker's "way had he persisted in this argument. To succeed on it, it "would have been necessary for him to satisfy us that the "'money or value arising from property not imported' need not "itself be brought into the United Kingdom. It is plain from "the wording of the rule that sums cannot be said to be received "in the United Kingdom from the first, second or fourth sources "unless the source was itself payable in, imported into, or brought "or to be brought into the United Kingdom. It would be strange "if the sums received in the United Kingdom from the third "source were within the rule although the money or value was "not imported or to be imported into the United Kingdom. It "would be all the more strange since sums received in the United "Kingdom from the fourth source—i.e., 'money or value so "'received on credit or on account in respect of . . . *such* money "'or value' (i.e., the third source)—could not bring the rule into "operation unless *such* money or value had been brought or was "to be brought into the United Kingdom. I incline, therefore, to "the view that to succeed under the rule in respect of sums "received from the third source the Crown must establish that "the money or value had been brought or was to be brought into "the United Kingdom." But, apparently, this particular point was not the subject of detailed argument.

Lord Normand said that he agreed with Lord Cohen's opinion "in omnibus," but Lord Morton of Henryton and Lord Tucker, while agreeing with Lord Cohen's opinion in other respects,

[97] [1925] A.C. 458, 464.

[98] 33 T.C. 226, 237.

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expressly reserved the question as to whether the money or value arising from property not imported must itself be brought into the United Kingdom.

In view of the weighty sources from which those expressions of opinion (though obiter) emanate, I should not feel it proper to hold otherwise. But for the other reasons I have given I would be in favour of allowing the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Solicitor of Inland Revenue; Vandercom, Stanton & Co.*

E. D.

[COURT OF CRIMINAL APPEAL.]

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Mar. 9, 23.
Lord Parker C.J., Devlin, Donovan, McNair and Hinchcliffe JJ.

REGINA *v.* COOK.

Criminal Law — Evidence — Character — Imputation on character of witnesses for prosecution — Confession — Accused's allegation that statements obtained by police by threats—Cross-examination as to previous convictions—Defendant appearing in person—Need for warning by prosecution or judge—Judge's discretion—Failure to exercise discretion—Whether miscarriage of justice—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*) (ii).

The appellant was charged with obtaining a motor-car by false pretences and with receiving five banker's cheque forms knowing them to have been stolen. The prosecution led evidence by a police officer of an oral and a written statement made by the appellant. The appellant, who conducted his case in person, said several times that the statements were obtained from him by means of a threat that if he did not speak his wife would be charged. Counsel for the prosecution thereupon said that he wished to put "certain "further questions," and the chairman said that counsel was strictly entitled to do so, although he (the chairman) would have thought it unnecessary. Counsel then elicited in cross-examination that the appellant had a long record of crime. The appellant was convicted on both counts, and appealed on the ground that his cross-examination on previous convictions was improper, in that he had not conducted his defence so as to involve an imputation on the character of the police officer within the meaning of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898.[1] Alternatively, if there had been such an imputation, no warning had been given to the

[1] Criminal Evidence Act, 1898, s. 1 (*f*): "A person charged and "called as a witness in pursuance of "this Act shall not be asked, and if "asked shall not be required to "answer, any question tending to "show that he has committed or been "convicted of . . . any offence other "than that wherewith he is then "charged, . . . unless . . . (ii) . . . "the nature or conduct of the de-"fence is such as to involve impu-"tations on the character of the "prosecutor or the witnesses for the "prosecution; . . ."

appellant that he was going too far, and the chairman should, in his discretion, have refused to allow the cross-examination:—

Held, (1) that the words of section 1 (*f*) (ii) of the Act of 1898 should be given their natural and ordinary meaning; and that the trial judge should, in his discretion, do what was necessary in the circumstances to protect the accused person from an application of the subsection that would be too severe.

Rex v. *Hudson* [1912] 2 K.B. 464; 28 T.L.R. 459; 7 Cr.App.R. 256 and *Rex* v. *Jenkins* (1945) 31 Cr.App.R. 1 applied.

(2) That, in the present case, the defence was so conducted as to involve an imputation on the character of the police officer, within the meaning of the subsection; that it was not clear that the chairman had exercised his discretion whether to permit the cross-examination, and it was therefore for the court to exercise its own discretion; that in the circumstances the questions should not have been put without a warning to the defence; but that there had been no miscarriage of justice, and, applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907, the appeal would be dismissed.

Per curiam. The attempt to give the words of the subsection a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion, and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words in favour of the defence. Cases of rape may be sui generis in this respect.

APPEAL against conviction and sentence.

The appellant, Albert Samuel John Cook, was convicted at Somerset Quarter Sessions (chairman: Judge A. H. Armstrong) of obtaining a motor-car by false pretences, for which he was sentenced to four years' imprisonment. He was convicted upon another count of the same indictment of receiving five banker's cheque forms knowing them to have been stolen, and for this offence he was sentenced to three years' imprisonment, to run concurrently with the first sentence.

The facts are stated in the judgment.

N. R. Blaker for the appellant.
John Inskip for the Crown.

The following cases, which were not referred to in the judgment, were cited in argument: *Rex* v. *Westfall* [2]; *Rex* v. *Bridgwater* [3]; *Rex* v. *Grout* [4]; *Rex* v. *Biggin* [5]; *Rex* v. *Sheean* [6]; *Rex* v. *Murray* [7]; *Reg.* v. *Thompson* [8]; *Reg.* v. *Marshall* [9]; *Rex* v. *Wright* [10]; *Rex* v. *Dunkley* [11]; *Rex* v. *Rappolt* [12]; *Reg.* v. *Cunningham.* [13]

[2] (1912) 28 T.L.R. 297; 7 Cr. App.R. 176.
[3] [1905] 1 K.B. 131; 21 T.L.R. 69.
[4] (1909) 26 T.L.R. 59; 26 T.L.R. 60; 3 Cr.App.R. 64.
[5] [1920] 1 K.B. 213; 36 T.L.R. 17; 14 Cr.App.R. 87.
[6] (1908) 24 T.L.R. 459.
[7] [1951] 1 K.B. 391; 66 T.L.R. (Pt. 2) 1007; 34 Cr.App.R. 203; [1950] 2 All E.R. 925.
[8] [1893] 2 Q.B. 12; 9 T.L.R. 435.
[9] (1899) 63 J.P. 36.
[10] (1910) 5 Cr.App.R. 131.
[11] [1927] 1 K.B. 323; 19 Cr.App. R. 78.
[12] (1911) 6 Cr.App.R. 156.
[13] [1959] 2 W.L.R. 63; [1958] 3 All E.R. 711.

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The judgment is reported solely upon the appeal against conviction.

Cur. adv. vult.

March 23. Devlin J. read the following judgment of the court: On September 26, 1958, the appellant was sentenced at Somerset Quarter Sessions to a term of four years' imprisonment for obtaining a motor-car by false pretences, and to a term of three years concurrent for receiving five banker's cheque forms knowing them to have been stolen. On March 9 this court heard his appeal against conviction and sentence and dismissed it. There is only one point in the appeal that deserves serious consideration, and that is the contention that the appellant was improperly cross-examined about his previous convictions.

The facts that are relevant to it can be shortly stated. On July 9, 1958, the premises of Ackland & Pratten Ltd. were broken into and among the property missing were five cheque forms. On July 25, a Mr. Long, who lives at Nailsea near Bristol, advertised a Humber Hawk motor-car for sale. On July 28 he was rung up by a woman who said that she was Mrs. Pratten and who arranged to buy the car. The appellant's wife was joined with him in the indictment, and it appears that the case for the prosecution against her was that she falsely pretended to be Mrs. Pratten. Separate trials were ordered and we are concerned only with the case against the appellant. Later, on July 28, the appellant telephoned Long to say that he was bringing round a cheque from Mrs. Pratten and would collect the car. The appellant came and represented himself to be an employee of Ackland & Pratten, a concern well known to Long. Long let him take away the car in exchange for a cheque for £430, signed G. E. Pratten. The cheque was on one of the stolen forms and the signature on it was fictitious.

The witnesses for the prosecution included a Detective-Constable Thomas, who gave evidence that on August 3, when the appellant was charged, he said that he made out the cheque himself, and admitted that he had got the car on a "dud" cheque. Later the appellant made a statement in writing in which he said that he found the cheque book in the road, dumped down by the side of the wall. The appellant conducted his case in person; and in the course of his cross-examination of the police officer he suggested that the statements had been obtained from him by means of a threat that if he did not speak his wife would be charged; this suggestion was denied. The appellant later gave evidence on his own behalf, and in answer to questions in cross-examination about his statements to the police he again said that he had made them under the threat that his wife would be charged. Upon that, counsel for the prosecution indicated that he wished to put "certain further questions." The chairman said that while counsel was strictly entitled to do so, he would have thought it would not be necessary. Counsel then put to the

appellant, and the appellant agreed, that he had a long record of crime behind him; details of various convictions for offences of dishonesty were then put. In the circumstances of this case and under the provisions of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898, those questions were permissible only if the nature or conduct of the defence was such as to involve imputations on the character of Detective-Constable Thomas.

It is clear from the subsection as a whole that it does not intend that the introduction of a prisoner's previous convictions should be other than exceptional. The difficulty about its phraseology is that unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character; a prisoner charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime. The authorities show that this court has endeavoured to surmount this difficulty in two ways. First, it has in a number of cases construed the words of the subsection as benevolently as possible in favour of the accused. Secondly, it has laid it down that, in cases which fall within the subsection, the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence.

The judgments in many of the earlier cases are based upon a limited construction of the statute. Thus, in *Rex* v. *Rouse*[1] it was held that a statement by the prisoner in cross-examination that the prosecutor was a liar must be regarded only as an emphatic denial of the truth of the charge against him and did not enable the prosecution to put his character in issue. Cases of rape have given rise to a peculiar difficulty; the prisoner cannot assert that the connection was with the consent of the prosecutrix without making imputations against her chastity. There was for a long time a difference of opinion about the effect of this; it was not definitely settled in favour of the defence until *Rex* v. *Turner*,[2] a case which was shortly after approved by the House of Lords in *Stirland* v. *Director of Public Prosecutions*.[3] At the same time this court has refused as a general rule to read words into the section that are not there. This was plainly laid down by a full court in *Rex* v. *Hudson*[4] in the following terms: "We think that the words of the section, "'unless . . . the nature or conduct of the defence is such as

[1] [1904] 1 K.B. 184; 20 T.L.R. 68.

[2] [1944] K.B. 463; 60 T.L.R. 332; 30 Cr.App.R. 9; [1944] 1 All E.R. 599.

[3] [1944] A.C. 315; 60 T.L.R. 461; [1944] 2 All E.R. 13; 30 Cr. App.R. 40.

[4] [1912] 2 K.B. 464, 470; 28 T.L.R. 459; 7 Cr.App.R. 256, 262.

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"'to involve imputations,' etc., must receive their ordinary and "natural interpretation, and that it is not legitimate to qualify "them by adding or inserting the words 'unnecessarily' or "'unjustifiably' or 'for purposes other than that of developing "'the defence,' or other similar words."

We need not go through the cases in detail. They were all carefully reviewed in the Scottish case of *O'Hara* v. *H.M. Advocate*,[5] and the effect of them is succinctly stated by the Lord Justice-Clerk as follows [6]: "The net result seems to be that "the Court of Criminal Appeal in England adheres to *Hudson* "with certain modifications in cases of rape and subject to the "discretionary power of the presiding judge." Since then *Rex* v. *Hudson* [7] has been again applied by this court in *Reg.* v. *Clark*.[8]

The alternative approach to the problem has been by the application of the general rule that the trial judge must always exercise his discretion so as to prevent the introduction of material whose prejudicial effect would outweigh its evidential value. The point that under this subsection the judge had a discretion was first made by Lord Sankey L.C. in *Maxwell* v. *Director of Public Prosecutions*.[9] It was made again by Lord Simon L.C. in *Stirland* v. *Director of Public Prosecutions*.[10] The principle was first elaborated in *Rex* v. *Jenkins*.[11] In that case this court reaffirmed *Rex* v. *Hudson* [12] and then dealt with the question of discretion. Singleton J. said [13]: "The subsection "was intended to be a protection to an accused person. A case "ought to be tried on its own facts and it has always been "recognised that it is better that the jury should know nothing "about an accused person's past history if that is to his dis-"credit. Just as it was recognised by the legislature that this "was fair and proper, so it was recognised that if the nature "or conduct of the defence was such as to involve imputations "on the character of the prosecutor or the witnesses for the "prosecution, it was equally fair and proper that counsel for "the prosecution should have the right to ask questions tending "to show that the accused person has committed or been con-"victed of an offence other than that which is under investiga-"tion. If and when such a situation arises, it is open to counsel "to apply to the presiding judge that he may be allowed to take "the course indicated, as was done in this case. Such an "application will not always be granted, for the judge has a "discretion in the matter. He may feel that even though the "position is established in law, still the putting of such questions "as to the character of the accused person may be fraught with

[5] 1948 S.C.(J.) 90.
[6] Ibid. 97.
[7] [1912] 2 K.B. 464.
[8] [1955] 2 Q.B. 469, 474; [1955] 3 W.L.R. 313; 39 Cr.App.R. 120; [1955] 3 All E.R. 29.
[9] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152.
[10] [1944] A.C. 315, 324.
[11] (1945) 31 Cr.App.R. 1.
[12] [1912] 2 K.B. 464.
[13] 31 Cr.App.R. 1, 14.

"results which immeasurably outweigh the result of questions "put by the defence and which make a fair trial of the accused "person almost impossible. On the other hand, in the ordinary "and normal case he may feel that if the credit of the prosecutor "or his witnesses has been attacked, it is only fair that the jury "should have before them material on which they can form their "judgment whether the accused person is any more worthy to "be believed than those he has attacked. It is obviously unfair "that the jury should be left in the dark about an accused "person's character if the conduct of his defence has attacked "the character of the prosecutor or the witnesses for the prosecu-"tion within the meaning of the section. The essential thing "is a fair trial and that the legislature sought to ensure by "section 1 (*f*)."

In our opinion the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in *Rex* v. *Hudson* [14] as applied in *Rex* v. *Jenkins*.[15] The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the subsection in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should, in his discretion, do what is necessary in the circumstances to protect the prisoner from an application of the subsection that would be too severe. It may be that, as indicated in *O'Hara* v. *H.M. Advocate*,[16] cases of rape should be regarded as sui generis; certainly the peculiar questions to which they give rise have been settled by *Rex* v. *Turner* [17] and that case has determined how the discretion should be exercised. No equally clear guidance can be given in cases where the subject-matter is not so specialised. In particular no firm rule has been, or can be, laid down to govern the sort of circumstances we have to consider here where the defence involves a suggestion of impropriety against a police officer. The cases on this subject-matter—in particular *Rex* v. *Preston*,[18] *Rex* v. *Jones*,[19] and *Reg.* v. *Clark* [20]—indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made upon the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive

[14] [1912] 2 K.B. 464.
[15] (1945) 31 Cr.App.R. 1.
[16] 1948 S.C.(J.) 90.
[17] [1944] K.B. 463.
[18] [1909] 1 K.B. 568; 25 T.L.R. 280; 2 Cr.App.R. 24.
[19] (1923) 39 T.L.R. 457; 17 Cr. App.R. 117.
[20] [1955] 2 Q.B. 469.

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at their verdict, then, as Singleton J. put it in *Rex* v. *Jenkins*[21] and Lord Goddard C.J. repeated in *Rex* v. *Clark*,[22] the jury is entitled to know the credit of the man on whose word the witness's character is being impugned.

We now apply these principles to the circumstances of this case. In our judgment, when the prosecution's evidence of an admission made to a police officer is met by saying that it was extorted by means of a threat that otherwise the prisoner's wife would be charged, the defence is so conducted as to involve an imputation on the character of the police officer. The issue, therefore, becomes one of discretion. It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision. But in this case we are not satisfied that the learned chairman really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter.

Mr. Blaker did not dispute that the conduct imputed to the police officer was grossly improper, but he submitted that it was not like a charge of fabrication or concoction which goes to the root of a witness's integrity and which, if accepted, destroys the whole of his evidence on every point in the case. He submitted also that the attack was not pointedly directed against the witness under cross-examination, but was made against the police generally. The charge was not elaborated or pressed; it was repeated several times, but that was probably because the prisoner is a man who often repeats himself. Finally, Mr. Blaker made the substantial point that no warning was given to the accused before his convictions were put to him. In cases of this sort where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection, or for the judge to give the defence a caution. This is especially needful when the prisoner, as here, was not represented, though it is fair to say that he professed familiarity with the law and rejected the legal aid that had been assigned to him. We have come to the conclusion that the questions ought not to have been put.

It is not often in this type of case that the proviso to section 4 (1) of the Criminal Appeal Act, 1907, can properly be applied. But here, in our judgment, the case against the appellant is overwhelming. The evidence for the prosecution called for some reasonable explanation by him about how he came to be in possession of the cheque forms and to use one with a fictitious signature on it. The prisoner's story was that a motor dealer called Todd, who had died just before the trial took place, offered

[21] (1945) 31 Cr.App.R. 1.

[22] [1955] 2 Q.B. 469, 479.

him a car for £300. The appellant agreed to buy the car; he had only got £165 but proposed to collect the balance off his mates in the morning. Todd then told the appellant to collect the car from Long, and for this purpose gave him the cheque signed in the name of Pratten for £430; this meant that Todd would have been losing £130 on the transaction. No one in his senses could believe a story of this sort. Apart from all its inherent improbability, it was quite inconsistent with the statements made by the appellant to Detective-Constable Thomas. Finally, we may add that the learned chairman gave to the jury a proper direction about the limited effect of the appellant's bad character.

Although we think that the chairman in his discretion should have refused to allow the appellant to be cross-examined as to his previous convictions, we are satisfied that the only reasonable and proper verdict on the facts was one of guilty, and that there has been no miscarriage of justice. It is for that reason that we dismissed the appeal.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Stileman, Neate & Topping for Fryer, Bennett & Deal, Weston-super-Mare.*

J. D. P.

[COURTS-MARTIAL APPEAL COURT.]

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March 25.
Lord Parker C.J., Streatfeild and Hinchcliffe JJ.

Criminal Law—Evidence—Confession—Inducement—Inadmissible confession by private soldier to sergeant-major—Subsequent confession after caution—Whether original inducement spent.
Criminal Law—Homicide—Causation—Incorrect treatment before death—Whether break in chain of causation.
Causation.

The appellant, a private soldier, was charged with the murder by stabbing of a soldier of another regiment during a barrack-room fight. Immediately after the fight the appellant's regimental sergeant-major put his company on parade and indicated that the men would be kept there until he learnt who had been involved in the fighting. At the trial the judge-advocate admitted in evidence a statement made by the appellant to the sergeant-major at that parade, confessing to the stabbing. Evidence was also given of a subsequent confession made the following day to a sergeant of the Special Investigation Branch after a caution had been administered. The deceased man had received two bayonet wounds, one of which pierced the lung and caused haemorrhage. While being carried to the medical reception station for treatment he was dropped twice. At the reception station he was given treatment which was subsequently shown to have been incorrect.

The appellant was convicted and appealed on the grounds, inter alia, that the alleged confessions were wrongly admitted in evidence and that the court was not properly directed as to causation:—

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Held, (1) that the confession obtained by the regimental sergeant-major was tainted by threat or inducement and was inadmissible.

(2) That if the threat or promise under which the first statement was made still persisted when the second statement was made, then that statement also was inadmissible; only if the time-limit between the two statements, the circumstances existing at the time and the caution were such that it could be said that the original threat or inducement had been dissipated could the second statement be admitted as a voluntary statement; in the present case the effect of the original inducement was spent and the second statement was admissible.

Dicta of Taunton J. in *Rex* v. *Meynell* (1834) 2 Lew.C.C. 122, 123; Patteson J. in *Reg.* v. *Sherrington* (1838) 2 Lew.C.C. 123, 124; Whiteside C.J. in *Reg.* v. *Doherty* (1874) 13 Cox C.C. 23, 24; Denman J. in *Reg.* v. *Rosa Rue* (1876) 13 Cox C.C. 209, 210 applied.

(3) That, as at the time of death the original wound was still an operating and a substantial cause, death could properly be said to be the result of the wound, albeit that some other cause also operated.

Dictum of Lord Wright in *The Oropesa* [1943] P. 32, 39; [1943] 1 All E.R. 211; *Minister of Pensions* v. *Chennell* [1947] K.B. 250; [1946] 2 All E.R. 719 applied.

Reg. v. *Jordan* (1956) 40 Cr.App.R. 152 distinguished.

Appeal against conviction.

The appellant, Thomas Joseph Smith, a private soldier in the King's Regiment, took part in a fight between a company of his regiment and a company of the Gloucestershire Regiment, who were sharing barracks in Germany, on the night of April 13, 1958. Three men of the Gloucesters received stab wounds. One of them subsequently died.

Immediately after the fight a regimental sergeant-major of the King's Regiment put his company on parade and indicated that it was his intention to keep them there until he learnt who had been involved in the fighting. Nobody stepped forward, and he then addressed each man personally. He was told by the appellant that he had been in bed at the relevant time. The sergeant-major then said, in effect, that he would not leave until he got an answer, and the appellant stepped forward and confessed to the stabbing, which he said he had done with a bayonet which was by a bed in the barrack-room. The next day a sergeant from the Special Investigation Branch, having cautioned the appellant, referred to his earlier confession, and the appellant then made a statement admitting the stabbing.

The appellant was convicted of murder at a general court-martial and was sentenced to imprisonment for life. He appealed on the ground that the confessions were wrongly admitted in evidence.

Roderic Bowen Q.C. and *H. K. Woolf* for the appellant.
E. Garth Moore for the Crown.

In addition to the cases referred to in the judgment, the following were cited in argument: *Rex* v. *Knight and Thayre* [1]; *Johnson's Case* [2]; *Reg.* v. *Ledger* [3]; *Thabo Meli* v. *The Queen* [4]; *Reg.* v. *Harris-Rivett* [5]; *Haynes* v. *Harwood.* [6]

LORD PARKER C.J. stated the facts and continued: The court is quite clear that while there was nothing improper in the action taken by the regimental sergeant-major, the evidence of what took place was clearly inadmissible at the prisoner's trial. What the sergeant-major did might well have been a very useful course of action in order to enable further inquiries to be made, but the court is satisfied that if the only evidence against the prisoner was a confession obtained in those circumstances, it would be quite inadmissible at his trial. It has always been a fundamental principle of the courts, and something quite apart from the Judges' Rules of Practice, that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary the court has been at pains to hold that even the most gentle, if I may put it in that way, threats or slight inducements will taint a confession. To say to all those on parade, "You are staying here and are "not going to bed until one of you owns up" is in the view of this court clearly a threat. It might also, I suppose, be looked upon as an inducement in that the converse is true, "If one of "you will come forward and own up, the rest of you can go "to bed"; but which ever way one looks at it, the court is of opinion that while the action was perfectly proper and a useful start no doubt to inquiries, evidence in regard thereto was clearly inadmissible.

The matter, however, does not rest there because at about 7.30 the next morning Sergeant Ellis from the Special Investigation Branch came down to make inquiries, and he, when he first saw the appellant, gave him the usual caution. He, however, went on to refer then to what had happened the night before. Apparently after administering the caution, he said, "There was "a disturbance last night in a barrack-room in Polish Barracks. "I understand that after the disturbance you admitted to your "R.S.M. that you had been involved and that you stabbed "three men of the Gloucestershire Regiment." Apparently Sergeant Ellis by then had been told that three men were involved. The prisoner replied: "Yes, I am not denying it. I "stabbed three of them all right." He was then asked if he wished to make a statement. He said: "Yes." A written caution was then made which the prisoner signed, and there followed a statement which I need not read, but which admitted

[1] (1905) 21 T.L.R. 310; 20 Cox C.C. 711.
[2] (1827) 1 Lew.C.C. 164.
[3] (1862) 2 F. & F. 857.
[4] [1954] 1 W.L.R. 228; [1954] 1 All E.R. 373.
[5] [1955] 3 W.L.R. 823; [1955] 3 All E.R. 567.
[6] [1935] 1 K.B. 146; 51 T.L.R. 100.

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that he had stabbed about three of them altogether with a bayonet which he found on the floor of the room.

It is urged by Mr. Bowen on his behalf that the original taint in the confession given to the sergeant-major really persisted in these later confessions, both oral and in writing, and in particular he points to the fact, as I have said, that Sergeant Ellis at the outset referred to what had taken place or what was said to have taken place the evening before. Mr. Bowen also referred us to a number of cases. It is unnecessary to refer to them in detail. He starts with *Rex* v. *Meynell* [1] in 1834, where in regard to a second confession Taunton J. said [2]: "I "am clearly of opinion that it is not receivable; it being im-"possible to say that it was not induced by the promise which "the constable made to her in the morning." In other words, he was saying that the second statement was inadmissible in that a promise made when the first statement was given was still in operation when the second statement was given. To the same effect was the opinion of Patteson J. in *Sherrington's* case,[3] where he said: "There ought to be strong evidence to show "that the impression under which the first confession was made, "was afterwards removed, before the second confession can be "received. I am of opinion, in this case, that the prisoner must "be considered to have made the second confession under the "same influence as he made the first; the interval of time being "too short to allow of the supposition that it was the result of "reflection and voluntary determination." I should observe that in neither of those cases was a caution administered before the second statement was obtained.

He also refers to an Irish case of *Reg.* v. *Doherty*,[4] where Whiteside C.J., in ruling on the admissibility of the second statement, said [5]: "The judges have held that it must be shown that "the prisoner thoroughly understood that he could expect no "gain from a confession. The subsequent caution must be shown "to have had the effect of removing all such expectation from "the prisoner's mind." Again, in *Reg.* v. *Rosa Rue*, Denman J. said [6]: "There are cases which hold that a confession once "rejected on the ground that it was made under an inducement "does not become admissible merely from the fact that it was "again made to some other person who has not held out an "inducement, the inducement being deemed to be a continuing "one. But I am not at this moment aware of any case in which "it has been held that, where the person who held out the in-"ducement is absent, then a confession made to a third party "is not admissible, no fresh inducement having been held out. "The general principle is clear, that if it is made out to the "satisfaction of the judge that the statement was not made "voluntarily, it is not admissible. It is not merely a question

[1] (1834) 2 Lew.C.C. 122.
[2] Ibid. 123.
[3] (1838) 2 Lew.C.C. 123, 124.
[4] (1874) 13 Cox C.C. 23.
[5] Ibid. 24.
[6] (1876) 13 Cox C.C. 209, 210.

"as to whom the confession is made or when it is made; but "it is a matter in which you have to get at the mind of the "prisoner, and see whether or not it is probable that the con-"fession was made voluntarily, in the proper sense of the word." Having consulted Kelly L.C.B., Denman J. held on the facts of that case that the second statement was so connected with the original inducement as to be inadmissible.

The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.

In the present case the judge-advocate never had to consider or rule on this second statement. Having admitted the first statement, there was no question on that basis but that the second statement must be also admissible. Accordingly, he never had to rule on the question of admissibility. He never had to exercise any discretion in the matter, and there was no occasion for his leaving it to the court as to the value or weight to be attached to the confession. This court, however, is of the clear opinion that the second statement was admissible. No doubt the opening reference to what it was said he had said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is clear that the effect of any original inducement or threat under which the first statement was made had been dissipated. Quite apart from the fact that the caution was given and given twice, some nine hours had elapsed and the whole circumstances had changed. The parade had ended. The rest of the company had gone to bed. The effect of the threat or the inducement was spent. On those grounds this court has come to the conclusion that the oral and written statements made to Sergeant Ellis were clearly admissible.

The second ground concerns a question of causation. The deceased man in fact received two bayonet wounds, one in the arm and one in the back. The one in the back, unknown to anybody, had pierced the lung and caused haemorrhage. There followed a series of unfortunate occurrences. A fellow-member of his company tried to carry him to the medical reception station. On the way he tripped over a wire and dropped the deceased man. He picked him up again, went a little farther, and fell apparently a second time, causing the deceased man to be dropped onto the ground. Thereafter he did not try a third time but went for help and ultimately the deceased man was brought into the reception station. There, the medical officer, Captain Millward, and his orderly were trying to cope with a

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number of other cases, two serious stabbings and some minor injuries, and it is clear that they did not appreciate the seriousness of the deceased man's condition or exactly what had happened. A transfusion of saline solution was attempted and failed. When his breathing seemed impaired he was given oxygen and artificial respiration was applied, and in fact he died after he had been in the station about an hour, which was about two hours after the original stabbing. It is now known that having regard to the injuries which the man had in fact suffered, his lung being pierced, the treatment that he was given was thoroughly bad and might well have affected his chances of recovery. There was evidence that there is a tendency for a wound of this sort to heal and for the haemorrhage to stop. No doubt his being dropped on the ground and having artificial respiration applied would halt or at any rate impede the chances of healing. Further, there were no facilities whatsoever for blood transfusion, which would have been the best possible treatment. There was evidence that if he had received immediate and different treatment, he might not have died. Indeed, had facilities for blood transfusion been available and been administered, Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as 75 per cent.

In these circumstances Mr. Bowen urges that not only was a careful summing-up required but that a correct direction to the court would have been that they must be satisfied that the death of Private Creed was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it. If there was, says Mr. Bowen, any other cause, whether resulting from negligence or not, if, as he contends here, something happened which impeded the chance of the deceased recovering, then the death did not result from the wound. The court is quite unable to accept that contention. It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court which will convey in simple language the principle of causation. It seems to the court enough for this purpose to refer to one passage in the judgment of Lord Wright in *The Oropesa*, where he said [7]:

[7] [1943] P. 32, 39.

"To break the chain of causation it must be shown that there is "something which I will call ultroneous, something unwarrant-"able, a new cause which disturbs the sequence of events, "something which can be described as either unreasonable or "extraneous or extrinsic." To much the same effect was a judgment on the question of causation given by Denning L.J. in *Minister of Pensions* v. *Chennell*.[8]

Mr. Bowen placed great reliance on a case decided in this court of *Reg.* v. *Jordan*, and in particular on a passage in the headnote which says[9]: ". . . that death resulting from any "normal treatment employed to deal with a felonious injury may "be regarded as caused by the felonious injury, but that the "same principle does not apply where the treatment employed is "abnormal." Reading those words into the present case, Mr. Bowen says that the treatment that this unfortunate man received from the moment that he was struck to the time of his death was abnormal. The court is satisfied that *Jordan's* case was a very particular case depending upon its exact facts. It incidentally arose in this court on the grant of an application to call further evidence, and leave having been obtained, two well-known medical experts gave evidence that in their opinion death had not been caused by the stabbing but by the introduction of terramycin after the deceased had shown that he was intolerant to it, and by the intravenous introduction of abnormal quantities of liquid. It also appears that at the time when that was done the stab wound which had penetrated the intestine in two places had mainly healed. In those circumstances the court felt bound to quash the conviction because they could not say that a reasonable jury properly directed would not have been able on that to say that there had been a break in the chain of causation; the court could only uphold the conviction in that case if they were satisfied that no reasonable jury could have come to that conclusion.

In the present case it is true that the judge-advocate did not in his summing-up go into the refinements of causation. Indeed, in the opinion of this court he was probably wise to refrain from doing so. He did leave the broad question to the court whether they were satisfied that the wound had caused the death in the sense that the death flowed from the wound, albeit that the treatment he received was in the light of after-knowledge a bad thing. In the opinion of this court that was on the facts of the case a perfectly adequate summing-up on causation; I say "on the facts "of the case" because, in the opinion of the court, they can only lead to one conclusion: a man is stabbed in the back, his lung is pierced and haemorrhage results; two hours later he dies of haemorrhage from that wound; in the interval there is no time for a careful examination, and the treatment given turns out in the light of subsequent knowledge to have been inappropriate and,

[8] [1947] K.B. 250.

[9] (1956) 40 Cr.App.R. 152.

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indeed, harmful. In those circumstances no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that the death resulted from the original wound. Accordingly, the court dismisses this appeal.

Appeal dismissed.

Solicitors: *Registrar, Courts-Martial Appeal; Director, Army Legal Services.*

J. D. P.

[COURT OF APPEAL.]

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Mar. 2, 3, 23.
Lord Evershed M.R., Sellers and Ormerod L.JJ.

EASTBOURNE CORPORATION *v.* FORTES ICE CREAM PARLOUR (1955) LTD.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether development occurred—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 23 (2) (4).

In or about June, 1956, a company placed an automatic coin-operated ice-cream sales machine on the forecourt outside its premises, which it used as an ice-cream parlour. There were holes in the base of the machine whereby it could be bolted to the ground when in use; the refrigeration plant in the machine was operated by electricity supplied through a cable. No planning permission was sought or obtained for the machine and by an enforcement notice dated May 16, 1957, served by the local planning authority, the company was required to remove the machine. The company appealed to the justices against the notice under section 23 (4) of the Town and Country Planning Act, 1947.[1]

[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to the "provisions of this section and to "the following provisions of this Act, "permission shall be required under "this Part of this Act in respect of "any development of land which is "carried out after the appointed day "[July 1, 1948].

"(2) In this Act, except where "the context otherwise requires, the "expression 'development' means "the carrying out of building, en-"gineering, mining or other opera-"tions in, on, over or under land, "or the making of any material "change in the use of any buildings "or other land:

"Provided that the following "operations or uses of land shall not "be deemed for the purposes of this "Act to involve development of the "land, that is to say:—(*a*) the "carrying out of works for the main-"tenance, improvement or other "alteration of any building, being "works which affect only the interior "of the building or which do not "materially affect the external ap-"pearance of the building; . . .

"(3) For the avoidance of doubt it "is hereby declared that for the pur-"poses of this section (*a*) the use as "two or more separate dwelling-"houses of any building previously "used as a single dwelling-house "involves a material change in the "use of the building . . . ; (*b*) the "deposit of refuse or waste materials "on land involves a material change "in the use thereof. . . .

"(5) Notwithstanding anything in "this section, permission shall not "be required under this Part of this "Act—(*a*) in the case of land which, "on the appointed day, is being used "temporarily for a purpose other "than the purpose for which it is "normally used, in respect of the "resumption of the use of the land

On appeal from a decision by the justices that there had been no development within section 12 (2) of the Act of 1947, the Divisional Court of the Queen's Bench Division (Lord Goddard C.J. dissenting) held that the justices had no jurisdiction under section 23 (4) of the Act to determine whether in fact development within section 12 had taken place. On appeal:—

"for the last-mentioned purpose; "(b) in the case of land which, on "the appointed day, is normally used "for one purpose and is also used on "occasions, whether at regular inter-"vals or not, for any other purpose, "in respect of the use of the land "for that other purpose on similar "occasions after the appointed day; "(c) in the case of land which on "the appointed day is unoccupied, in "respect of the use of the land for "the purpose for which it was last "used: . . ."

S. 17. Applications to determine whether permission [is] required: "(1) If any person who proposes to "carry out any operations on land "or make any change in the use of "land wishes to have it determined "whether the carrying out of those "operations or the making of that "change in the use of the land, would "constitute or involve development "of the land . . . and, if so, whether "an application for permission . . . "is required . . . having regard to "the provisions of the development "order, he may . . . apply to the "local planning authority to deter-"mine that question.

"(2) The foregoing provisions of "this Part of this Act shall, sub-"ject to any necessary modifications, "apply in relation to any application "under this section and to the deter-"mination thereof as they apply in "relation to applications for per-"mission to develop land and to the "determination of such applications: "Provided that where it is decided "by the Minister under any of the "said provisions that any operations "or use . . . would constitute de-"velopment . . . or that an applica-"tion for permission is required . . . "that decision shall not be final for "the purposes of any appeal to the "court under the provisions of this "Part of this Act relating to the "enforcement of planning control, in "relation to those operations or that "use."

S. 23: "(1) If it appears to the "local planning authority that any "development of land has been "carried out after the appointed day "without the grant of permission "required in that behalf under this "Part of this Act, or that any con-"ditions subject to which such per-"mission was granted in respect of "any development have not been "complied with, then, subject to any "directions given by the Minister, "the local planning authority may "within four years of such develop-"ment being carried out, if they "consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section.

"(2) Any notice served under this "section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged "to have been carried out without "the grant of such permission as "aforesaid or, as the case may be, "the matters in respect of which it "is alleged that any such conditions "as aforesaid have not been com-"plied with, and may require such "steps as may be specified in the "notice to be taken within such "period as may be so specified for "restoring the land to its condition "before the development took place ". . . and in particular may . . . "require . . . the discontinuance of "any use of land. . . .

"(4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may . . . appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(a) if satisfied that per-"mission was granted under this "Part of this Act for the develop-"ment to which the notice relates, "or that no such permission was "required in respect thereof, or, as "the case may be, that the condi-"tions subject to which such per-"mission was granted have been "complied with, shall quash the "notice to which the appeal relates; "(b) if not so satisfied, but satisfied "that the requirements of the notice "exceed what is necessary for re-"storing land to its condition before "the development took place . . . "(c) in any other case shall dismiss "the appeal: . . ."

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Held, allowing the appeal, that the powers conferred on the justices by section 23 (4) enabled inquiry to be made into the allegation which had to be made in every enforcement notice that unauthorised development had, in the opinion of the local authority, been carried out. The allegation involved a double inquiry, first whether there had been "development" after July 1, 1948, or at all, and if after that date, whether it was of a kind that required permission under the Act.

East Riding County Council v. *Park Estate (Bridlington) Ltd.* [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669 applied.

Norris v. *Edmonton Corporation* [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801 approved.

Keats v. *London County Council* [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303 overruled.

Point of Ayr Collieries Ltd. v. *Lloyd-George* [1943] 2 All E.R. 546 distinguished.

Decision of Divisional Court [1958] 2 Q.B. 41; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276 reversed.

Appeal from Divisional Court.

The following statement of the facts is taken from the case stated by the Eastbourne justices.

On June 13, 1957, a complaint was preferred by the respondents, Fortes Ice Cream Parlour (1955) Ltd , for an order to quash or vary a notice dated May 16, 1957, of the appellants, the Eastbourne Corporation, relating to premises at 247, Terminus Road, Eastbourne, and expressed to be an enforcement notice served pursuant to section 23 of the Town and Country Planning Act, 1947. The notice was in the following terms: "Whereas "an automatic ice-cream sales machine has been affixed to and "installed on the forecourt of the premises known as 247, "Terminus Road, Eastbourne, and whereas the aforementioned "operations constitute development within the meaning of the "above Act and (a) the said operations have been carried out "without the grant of planning permission under Part III of the "said Act; Now therefore the [corporation] do hereby give you "notice in pursuance of their powers as local planning authority "under sections 23 and 24 of the aforementioned Act to:—remove "the said automatic ice-cream sales machine together with the "electric cable attached thereto and further to remove the bolts "and other fittings securing the said machine to the said fore-"court within 21 days after the date on which this notice becomes "effective."

The justices found the following facts: The premises at 247, Terminus Road comprised a shop on the ground floor and basement of a building at the corner of Terminus Road and Burlington Road. They were occupied by the company as an ice-cream parlour and restaurant under a lease held in trust for the company by one Forte, a director thereof. There was a paved forecourt adjoining the public footway of the above roads, and the shop-front facing these roads had a black base, large glass windows displaying food menus and advertisements, and a facia-board at

a height of from 12 to 14 feet above the forecourt bearing the words "Fortes Ice Cream Parlour."

In or about June, 1956, the company bought an automatic coin-operated ice-cream sales machine and had it placed on the forecourt in the corner of its premises nearest to the adjoining premises at 245, Terminus Road. The machine was blue and white in colour, was 6 feet 2 inches high, approximately 30 inches square, and weighed approximately 5½ hundredweight. The machine was not attached to the forecourt by bolts or otherwise. The refrigeration plant in the machine was operated by electricity supplied through a cable (housed in a ⅝th in. conduit) which was connected to the mains supply in the aforesaid premises. The conduit, black in colour, came from a grille in the base of the shop-front and was fitted by an electrician from a near-by shop. No planning permission under the Town and Country Planning Act, 1947, was sought or granted on any application relating to the machine. The company's machine was removed on only one occasion, June 24, 1957, when photographs were taken of the premises without the machine, which was thereafter immediately replaced. It took above five minutes to disconnect the electricity cable and remove the machine. By fitting a "niphan" switch the time taken to disconnect the cable could be considerably shortened.

The company contended that the justices were not bound to assume that the matters alleged in the enforcement notice had occurred or, insofar as they had occurred, that they constituted development, but could determine whether or not any operations amounting to development had occurred; that neither what was alleged in the notice, nor what in fact had occurred, amounted to the carrying out of development within section 12 of the Act of 1947, and accordingly the justices might be satisfied that no permission was required in respect thereof.

Alternatively, the company contended that any operations carried out did not involve development by reason of proviso (*a*) to section 12 (2) of the Act of 1947, and it was further contended that the requirements of the enforcement notice (except insofar as they were incapable of performance) had been satisfied (before the beginning of the period allowed for this purpose) on June 24, 1957; that in any event the form of notice used in this case was inappropriate. The company conceded that placing a machine on land might in some cases involve a material change of use, but not in this case.

The corporation contended that the installation of the machine constituted development within section 12 (2) of the Act of 1947, and as such required planning permission under section 12 (1) of the Act.

The justices were of the opinion that it was open to them to determine whether the matters alleged as constituting development had in fact occured and whether, if so, they constituted development within section 12 (2) of the Act of 1947; in this

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case there had been no such development. They therefore quashed the notice.

The corporation appealed. The Divisional Court held (Lord Goddard C.J. dissenting) that the justices had no jurisdiction under section 23 (4) of the Act of 1947 to determine whether in fact development within section 12 of the Act of 1947 had taken place; they had to assume that it had, and their jurisdiction was limited to ascertaining whether permission had been granted or whether the alleged development fell within the class of development for which permission was not required. The company appealed.

John Pennycuick Q.C. and *J. D. James* for the company.

Geoffrey Lawrence Q.C. and *Peter Boydell* for the corporation.

In addition to the cases referred to in the judgments, the following were cited in argument: *Postill* v. *East Riding County Council* [2]; *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [3]; *Wood* v. *Riley* [4]; *Arnold* v. *Gravesend Corporation* [5]; *Francis* v. *Yiewsley and West Drayton Urban District Council* [6]; *Liversidge* v. *Anderson.* [7]

Cur. adv. vult.

March 23. Lord Evershed M.R. stated the facts and continued: I adopt as a statement of the problems raised by the appeal the language of Lord Goddard C.J.[1]: "The question we "have to determine depends, in my opinion, on the construction "of the words 'if satisfied that permission was granted under "'this Part of this Act for the development to which the notice "'relates, or that no such permission was required in respect "'thereof.' Is the court to assume that there has been development and to confine themselves to considering whether it is "development permitted by the Act without permission, or can "they go further and decide that there has not in fact been any "development? I propose in the first place to treat this as a "matter of construction and then to consider what effect, if any, "the cases which have been decided on the section have upon the "conclusion to which I have come."

I propose, accordingly, for my part also to deal with the problems raised as he did and as, indeed, they were presented to us by counsel for the appellant company and the corporation: namely, first to consider the matter of construction of the Act, and second, the effect of the cases, and particularly of the *East*

[2] [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685.
[3] [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.
[4] (1867) L.R. 3 C.P. 26.
[5] (1856) 2 Kay & J. 574.
[6] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.
[7] [1942] A.C. 206.
[1] [1958] 2 Q.B. 41, 49; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

Riding County Council v. *Park Estate* (*Bridlington*) *Ltd.* in the House of Lords.[2]

First, then, as to the construction of the Act. The vital words in section 23 (4) are those cited by Lord Goddard C.J.—"or that no such permission was required in respect thereof." [His Lordship read the relevant parts of section 12 as set out above and continued:] Mr. Lawrence observed on behalf of the respondents that three conceptions are involved in section 12, namely: (1) that of "development of land," which is closely defined in the section; (2) that of changes of user which are deemed not to constitute development; and (3) that of changes of user which, though constituting development, are excused from requiring permission. Mr. Lawrence drew attention to the distinction between the second and third conceptions. Parliament might, as he pointed out, have treated those changes in user falling within the second conception in the same way as those falling within the third, namely, that they were excused from the requirement of permission. An answer to his point in this respect may be that, by so doing, Parliament would or might have thereby widened the meaning of the word "development." But the distinction is made and was somewhat relied upon, as later appears, by Mr. Lawrence in support of his argument for the corporation.

I turn at once to section 23. [His Lordship read the section as set out above and went on:] As I have already stated, the relevant words in the last subsection that I have read, subsection (4), are "that no such permission was required in respect "thereof."

It was conceded by Mr. Lawrence that if his arguments were to prevail the clear meaning of these words *must* exclude the relevant inquiry, videlicet, whether the use alleged or complained of constituted development at all. The concession was, in my judgment, necessary; for if upon this matter the construction and scope of the words be doubtful, then Mr. Lawrence would be inevitably faced with the serious difficulty presented to his argument by inconsistency created by other provisions in the Act and most forcibly by the terms of section 17.

Mr. Lawrence's first submission was based on the strict limitation upon the powers of justices which appears from the language of section 23 (4) itself, and particularly the words in paragraph (*c*) "in every other case shall dismiss the appeal." The limitation is indeed plain and has been noted in the cases, including the *East Riding* case[3] itself. With this background of strict limitation of powers, Mr. Lawrence then proceeded to emphasise the word "such" immediately before the word "permission" in the relevant formula. He contended—and in my judgment rightly contended—that the word "such" was a reference back to section 12, so that the phrase, when extended,

[2] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

[3] [1957] A.C. 223.

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reads "no permission under this Part of this Act was required" —etc. With this interpretation of the word "such" Mr. Megarry (who argued this point in *Guildford Rural District Council* v. *Fortescue*,[4] our judgment in which follows after this case) was himself in agreement. It follows, according to Mr. Lawrence, that if you do refer back to section 12, then permission is only found to be required for what must be, or must be assumed to be, post-1948 development. Thus, although in this matter Mr. Lawrence may be said to have protected his argument in advance from the effect of the *East Riding* case,[5] it may be open to the justices to inquire whether the "development" was carried out before or after the appointed day. But that, according to Mr. Lawrence's argument, is all that the justices may investigate as regards the existence of the development. In other words, subject to this one question of date, the justices' only function, according to the proper meaning of the language used in the relevant formula, is to inquire whether the development mentioned in the notice is or is not of the "excused" class. Thus will be observed the significance of the distinction emphasised by Mr. Lawrence between the second and third conceptions above mentioned, that is, the conception of user not deemed to be development and user which, though constituting development, is excused from the requirement of permission.

Mr. Lawrence sought further support for his contention from the opening formula in section 23 (1), "if it appears to the local "planning authority . . . ," a formula which he claimed to be hallowed by authority as indicating the intention by Parliament that that which so appeared in good faith was unchallengeable in the courts; and he cited by way of illustration the judgments of Lawrance J. and Channell J. in *Robinson* v. *Corporation of Sunderland*[6] and of this court in *Point of Ayr Collieries Ltd.* v. *Lloyd-George*.[7] Finally, Mr. Lawrence drew attention to the contrast between the limited scope of the justices' powers as it appears from the terms of section 23 (4) of the Act of 1947 and the generality of the corresponding powers of the older legislation (see section 13 (4) of the Town and Country Planning Act, 1932, and section 5 (2) and the First Schedule to the Interim Development Act of 1943). The contrast, said he, emphasised that in the later legislation Parliament deliberately circumscribed the powers vested in the magistrates' courts of interference with the planning authorities.

There is plainly great force in these arguments. It is, in my judgment, undeniable that upon a first reading of the relevant words in section 23 (4) the draftsman appears to be directing himself to the question whether the (assumed) development is of a kind for which no permission is required—the conception of "excused development." I do not therefore doubt that the words may fairly, and perhaps more naturally, be construed in

[4] Post, p. 643.
[5] [1957] A.C. 223.
[6] [1899] 1 Q.B. 751.
[7] [1943] 2 All E.R. 546.

this narrow sense. But I have for my part reached a clear conclusion that it is not the necessary and inevitable meaning of the words.

I will first dispose briefly of the two general contentions on the respondents' part last mentioned. There is no doubt that in certain contexts and for certain purposes the words "if it "appears" and similar formulae are intended to exclude challenge where the opinion formed has been arrived at in good faith. But, as Mr. Pennycuick pointed out, in these cases the purpose and effect of the formation of such an opinion was not itself to determine private rights but was the condition precedent for the exercise of some statutory power. Thus, in the *Point of Ayr* case [8] the formation by the Minister of Fuel and Power of the opinion that the interests of public safety or the efficient prosecution of the War or like considerations required it, gave rise to a power on his part to take the necessary steps to assume control of a colliery undertaking. Such considerations have no application to the present case, where the relevant question is whether unauthorized development of land has taken place—a question admittedly liable to challenge at some stage, under section 24, if not under section 23. In such a case there would appear to be no natural ground of logic or precedent for giving to three simple English words the effect of prejudging one of the essential matters of fact on which the justification of the owner's actions will depend.

I am also unable to think that the difference in the relevant terminology between the old and the new legislation can really assist in the problem of construction. And I note that, notwithstanding the change in form, the scheme of the older legislation does not differ from that of the new in this, that where the planning authority seek actually to enforce their previous notice, then the owner will not be entitled to rely by way of defence on points that he might have earlier taken by way of appeal to the justices (see section 13 (6) of the Act of 1932).

I return to the vital language of section 23 (4) of the Act of 1947; and, in my judgment, much assistance towards a proper solution is to be found in the last seven words ". . . the develop- "ment to which the notice relates." For properly expounded by reference to the earlier subsections (1) and (2), these words must, in my view, mean (and I am again indebted to Mr. Megarry in the *Guildford* case [9]) "the development which is alleged to have "been carried out without the grant of permission required in "that behalf under this Part of the Act." In my judgment, it is the use of the word "alleged" derived from subsection (2) that provides the all-important clue. It is, as I think, an essential requirement of the enforcement notice that it should *allege* development carried out without permission; and I can see no compelling reason for holding that the only subject of the "allega- "tion" is the absence of permission, the development itself (that

[8] [1943] 2 All E.R. 546.

[9] Post, p. 643.

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is, the requirement) being assumed. On the contrary, it appears to me more natural to treat the allegation as being, as it were, a double allegation—an allegation both of the development (requiring permission) having been carried out and of the absence of permission; and, if so, that the justices' powers conferred by the formula in question involve inquiry whether no permission under Part III of the Act was required on the ground that there had been in fact no development either after 1948 or at all, no less than on the ground that, though post-1948 development had occurred, it was of a kind that did not require permission.

If, then, this is a fair and legitimate view of the construction of the subsection, there are (as I have earlier indicated) strong grounds of consistency in the Act as a whole, and of convenience, for its adoption. I refer first to section 75, which makes applicable, subject to the provisions of the section, the enforcement procedure of section 23 to contraventions of pre-1948 planning control. But in such cases there is substituted for the terms of paragraph (*a*) of section 23 (4) the paragraph (*a*) set out in section 75 (5), namely, "if satisfied that the works or use to which the "notice relates are not works or a use to which section 75 of this "Act applies, shall quash the notice to which the appeal relates." In my judgment it is impossible, according to the ordinary sense of this paragraph, to deny to the justices the power of determining whether in fact the use complained of occurred before 1948 or at all; and if this is right there would, according to the respondents' argument, be an incongruity between the justices' powers in the cases of alleged pre-1948 and post-1948 development.

More cogent still, however, are the terms of section 17. This section relates to "Applications to determine whether permission "[is] required." [His Lordship read section 17 as set out above and continued:] It is clear, and was conceded by Mr. Lawrence, that the terms of the proviso to subsection (2), which clearly assume the power which the respondents deny, cannot be reconciled with section 23 (4) if the respondents' contention is well-founded. Faced with this repugnancy, Mr. Lawrence would reject the proviso to section 17 (2) altogether—for no middle course is possible. This was indeed the conclusion of the majority of the Divisional Court. But I am unable to accept the necessity. It is no doubt true, as Donovan J. said, that if two sections of an Act of Parliament are in truth irreconcilable, then prima facie the latter will be preferred: and that the courts will tend against inferring an independent substantive enactment from a mere proviso to another enactment. But these are arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the Parliamentary intention. In the present case, for reasons already given, I do not think the repugnancy, upon a true analysis, arises.

On the matter of convenience, perhaps I may be allowed, in anticipation of what follows, to cite from my own speech in the

East Riding case.[10] "But other cases may well arise in which "serious questions of fact might be involved, questions whether "in truth the development had been carried out before the "appointed day or whether the land had in fact ever been used "as alleged. If in such cases it were beyond the jurisdiction of "the justices upon an appeal to determine such questions of fact, "then the only course open to the owner would be to await the "taking of further steps by the authority under section 24 of the "Act and then to challenge the validity of the notice; a course "which might well involve him in a long period of uncertainty "and would certainly be likely to expose him to serious expense. "Equally might such a course of proceedings be an embarrass-"ment to the authority, who might find, when the facts had "turned out ultimately against them, that it was then too late to "exercise their statutory powers and duties at all."

I, therefore, upon the question of construction reach the same conclusion as Lord Goddard C.J.; and I am unable, with all respect to them, to agree with the view of the majority of the court as expressed by Donovan J.[11] "I think it is inaccurate to "speak of permission not being required under the Act on the "ground that the particular operation or change of use is not "'development.' For then, as I say, the question does not "arise at all. The phrase is apt only to refer to that which "is development but which the Act exempts from the necessity "for permission."

It is at this point that I have to part company with the judge; for in saying that, in the circumstances he supposed, "the "question does not arise at all," he might, as it seems to me, be said to be begging the question which has to be decided.

I add in conclusion upon this part of the case that (particularly having regard to section 17, to which I have already adverted) I can see no sufficient ground for supposing that the competence of the justices to inquire, aye or no, into the fact of development should be regarded as a subject-matter inappropriate for their jurisdiction. Rather, and as a matter of principle, I should prefer the view that clear words must be found to justify an ousting, upon such a matter, of the jurisdiction of the courts.

I turn now to the second question posed at the beginning of this judgment, namely, what effect, if any, the decided cases, and particularly the *East Riding* case,[12] have had upon the question. In the *East Riding* case,[12] the questions before the House of Lords included the questions whether the enforcement notice there in suit ought to be taken as alleging a post-1948 development and, if so, whether the justices had power to quash it, the alleged development being admitted or found to have been pre-1948. These questions were answered affirmatively by the majority of the House. It will, however, be observed that the second of these two questions was not the precise question now before us.

[10] [1957] A.C. 223, 252.
[11] [1958] 2 Q.B. 41, 52.
[12] [1957] A.C. 223.

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The problem in the *East Riding* case,[12] so far as it concerned development, was confined to date—a problem which Mr. Lawrence conceded might be regarded as open to inquiry by the justices, having regard to the reference to the appointed day in section 12 (1) of the Act. The problem whether it is competent for the justices to investigate the question whether what has been done amounts to development at all within the meaning of the Act was not expressly decided, and indeed may be said to have been deliberately left undecided by the last paragraph of my own speech.

Nevertheless, I agree with Lord Goddard C.J. that the reasoning which underlay the decision of the majority of the House applies to, and covers, the present question. Viscount Simonds, in his leading speech, said[13]: "I do not dissent from the "conclusion to which the Divisional Court came, and I think "that, in the earlier part of the passage that I have cited, the "view is clearly expressed that, upon its true construction, the "notice purported to refer to the development for which permis-"sion under the 1947 Act was required, whereas in fact such "permission was not required. That, not the lack of clear indica-"tion, gave jurisdiction to quash." Lord Cohen similarly stated his conclusion in general terms[14]: "It was proved before the "magistrates that the development took place before the "appointed day, and it was agreed that no obligation rested on "the respondents to obtain permission under the law in force "before the appointed day. It seems to me that, in these "circumstances, the respondents proved that no such permission "was required in respect thereof, that is, in respect of 'the "'development to which the notice relates.' The magistrates, "therefore, had jurisdiction to quash the enforcement order, and, "in my opinion, they should have done so." The matter is dealt with perhaps more fully in my own speech; and I have already referred to the concluding paragraph, where I said[15]: "The "words in section 23 (4), 'no such permission was required in "'respect thereof,' are clearly capable of application to any case "in which permission was not in truth required under the 1947 "Act, whether because the development was of a kind which by "the terms of the Act called for no permission or because the "development, by reason of the date when it was carried out, "was outside the scope of the Act altogether. In the absence, "therefore, of any provision for the case of a notice related to "development alleged to have been carried out after July 1, 1948, "but executed in fact prior to that date, and having regard to the "incongruity which would otherwise appear to arise in the con-"verse case of a notice related to development alleged to have "been carried out before, but in fact executed after, the appointed "day, I think the Court of Appeal and the Divisional Court were "right in holding that in the circumstances and upon its true

[12] [1957] A.C. 223.
[13] Ibid. 234.
[14] Ibid. 247.
[15] Ibid. 252.

"construction the enforcement notice of April 26, 1951, ought to "have been quashed by the justices." Although in this passage I do not refer to the problem which has arisen in this case, I venture to think that, in the light of the earlier argument in the speech, my conclusion must be taken to have been in favour of a construction of the relevant words rendering them applicable to any case in which permission was not, for any reason, required under the Act of 1947. Put in other words, I think that if we were to distinguish the present case from that directly covered by the *East Riding* case,[16] we would introduce an extremely narrow and unjustifiable refinement in the construction of the section.

Agreeing, then, as I do, with the judgment of Lord Goddard C.J., I agree also with him that *Keats* v. *London County Council*[17] must be taken to have been wrongly decided, and that the opinion to that effect expressed by the Divisional Court in *Norris* v. *Edmonton Corporation*[18] was correct.

We were referred to a number of other cases by Mr. Megarry in the *Guildford* case[19] and by Mr. Pennycuick. In none of these other cases was the point raised which calls for determination in the present case. I do not therefore find it necessary to refer further to them save to say that there is nothing in any of the judgments in those cases which is in conflict with the view that I have formed.

This court, like the Divisional Court, has been much assisted by the full arguments of Mr. Pennycuick and Mr. Lawrence, and also by the argument in the *Guildford* case[19] of Mr. Megarry which Mr. Pennycuick adopted, and I wish to acknowledge my indebtedness to counsel accordingly. Mr. Lawrence informed us that the particular concern of the Eastbourne Corporation (and other local planning authorities) was to obtain from the court a decision which would assist them in the performance of their duties under the Act. For this reason I have thought it desirable to deal somewhat fully with the arguments put before us. But in the end I have reached a clear conclusion that Mr. Pennycuick's contention should prevail. I think, therefore, that the appeal should be allowed. Since no other matter is raised in the appeal, the result will be that the question raised by the case stated will be answered in the affirmative, and that the justices were entitled to quash the enforcement notice.

I am authorised by ORMEROD L.J. to say that he agrees with the judgment which I have just delivered.

SELLERS L.J. On the construction of the words "if satisfied "that permission was granted under this Part of this Act for the "development to which the notice relates or that no such permis-"sion was required in respect thereof," I would go the whole way

[16] [1957] A.C. 223.
[17] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.
[18] [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801.
[19] Post, p. 643.

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with the reasoning and conclusion of Lord Goddard C.J. in his dissenting judgment.

No permission is required unless there has been development, and on their face the words "or that no such permission was "required in respect thereof" would permit, as I read them, of a contention that no permission was required because there had been no development.

If it is to be conceded that section 23 construed narrowly by itself can be made to work and can so provide a more limited jurisdiction to the justices, this construction admittedly would put the section out of harmony with the Act as a whole, as it involves ignoring the proviso to section 17 (2).

The interpretation which the appellants advance, and which my Lord has stated and developed in detail, relies on and accepts in full the proviso and leaves no repugnancy or inconsistency or, as Donovan J. puts it, no "real difficulty." [20]

Further, Donovan J. says [21]: "If local benches of magis-"trates . . . can override the planning authority upon the "question whether something is 'development' or not, it is "obvious that they can interfere with all development plans, "and that a large measure of planning control (as distinct from "enforcement) has been placed in their hands. Had this been "Parliament's intention, I cannot believe that it would have been "effected by a mere proviso in a section dealing with a different "subject-matter."

The force of this comment seems to be minimised when it is seen that if the penal powers under section 24 of the Act were to be invoked, the justices would admittedly have power to consider whether development had taken place or not and so, if thought fit, "override" the planning authority.

Unguided by my Lord here and, perhaps, more compellingly by his speech in the *East Riding* case [22] in the House of Lords, I should not have felt any certainty or probability that by the words "or that no such permission was required in respect there-"of," the draftsman was intending to direct himself solely to the question whether the (assumed) development is of a kind for which no permission is required, but with that unimportant reservation, if unfettered, I agree entirely with the judgment delivered by my Lord and would allow the appeal accordingly.

Appeal allowed.
Case remitted to justices with the opinion that their decision was correct.
Leave to appeal to House of Lords.

Solicitors: *Clifford-Turner & Co.; Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne.*

E. D.

[20] [1958] 2 Q.B. 41, 53.
[21] Ibid. 54.
[22] [1957] A.C. 223, 247.

[COURT OF APPEAL.]

GUILDFORD RURAL DISTRICT COUNCIL *v.* FORTESCUE. SAME *v.* PENNY.

C. A.

1959
Feb. 25, 26, 27; *Mar.* 2, 23.

Lord Evershed M.R., Sellers and Ormerod L.JJ.

Town and Country Planning—Development—Material change of user—Increase of user—Enforcement notice—Pre-Act user of land as caravan site—Number of caravans increased—Whether a material change of user—Fact or law—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 12.

Fact or Law.

The appellants in the second appeal were the owners of land used as a caravan site, and the appellants in the first appeal were the occupiers of the caravans on the land. From 1934 to 1955 the land had been used as a health and holiday camp. On July 1, 1948, when the Town and Country Planning Act, 1947, came into operation, there were eight residential caravans on the land, and at the date of the hearing before the justices their number was 27. The respondents, as the local planning authority, served on the appellants an enforcement notice under sections 23 and 24 of the Town and Country Planning Act, 1947,[1] requiring them to discontinue the use of the land for the stationing of caravans in excess of 21 (the number for which the Minister of Housing and Local Government had granted planning permission).

The justices, on the application of the appellants, quashed the enforcement notice, holding that the increase in the number of caravans did not constitute development within section 12 of the Act.

The Divisional Court allowed the local authority's appeal from the justices' order on the ground that the justices had no jurisdiction to make the order quashing the enforcement notice:—

Held, (1) that the justices had jurisdiction to quash the enforcement notice.

Eastbourne Corporation v. *Fortes Ice Cream Parlour (1955) Ltd.*, ante, p. 630, followed.

(2) That, assuming that this land had, at all relevant times, been used as a caravan site, whether the increase in the number of caravans from eight to 27 constituted development as being a material change of use of land was not a question of law, but a question of fact, and that it was not open to the Court of Appeal to interfere with the finding of facts by the justices.

Semble, an increase or intensification of use of land might amount to a material change of use.

Decision of the Divisional Court reversed.

APPEALS from the Divisional Court.

These two appeals were heard together and arose out of the same facts. The second appeal, that of Mr. and Mrs. Penny, was

[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to "the provisions of this section and "to the following provisions of this "Act, permission shall be required "under this Part of this Act in "respect of any development of land "which is carried out after the ap-"pointed day. (2) In this Act, "except where the context otherwise "requires, the expression 'develop-"'ment' means the carrying out of "building, engineering, mining or "other operations in, on, over or "under land, or the making of any "material change in the use of any "buildings or other land . . ."

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alone argued. Mr. and Mrs. Penny were the owners of land in Tannery Lane, Ripley, Surrey, which was used as a caravan site. It was situated in the area for which the Guildford Rural District Council, the respondents, were the local planning authority. The appellants in the first appeal were some 23 persons who were occupiers of caravans on the land. The following facts appeared from the case stated by the justices for the county of Surrey acting for the Petty Sessional Division of Woking:

On September 16, 1957, a complaint was preferred by the appellants against the respondents for an order under section 23 of the Town and Country Planning Act, 1947, that an enforcement notice relating to the land in Tannery Lane, served on August 21, 1957, upon the appellants in pursuance of that section be quashed. The land to which the enforcement notice related was about 1½ acres in extent. From about 1934 until March, 1955, it was used as a health and holiday camp. The use involved: (1) the construction of chalets on the land for use as holiday homes, none of which remained in existence; (2) the use of the land for camping in tents; (3) the use of the land as a site for caravans; the number of caravans stationed on the land at any one time between 1934 and 1955 was never less than three or more than eight.

During the war not less than two of the caravans on the land were used as permanent residences. In June, 1955, the number of caravans on the land, all used as permanent residences, had increased to 15. The appellants then applied for permission under section 14 of the Act to continue the use of the land as a site for residential caravans up to a maximum number of 35. That application was refused. The appellants appealed to the Minister under section 16 of the Act. In April, 1956, a public inquiry was held. The number of residential caravans on the land had then increased to 21. On June 18, 1956, the Minister allowed the appeal to the extent that he permitted the use of the land for the stationing of not more than 21 caravans.

At the date of the service of the enforcement notice the number of caravans on the land was 26, and at the date of the hearing before the justices, 27.

On December 15, 1955, the respondents granted to the appellants a licence, pursuant to the provisions of section 269 of the Public Health Act, 1936, authorising the use of the land as a site for caravans not exceeding 30 in number.

It was contended by the respondents: (a) that the increase in the number of residential caravans on the land, which occurred between July 1, 1948, and the grant of permission by the Minister, constituted a material change in the use of the land and, accordingly, that there had been a development of the land for which permission was required under the provisions of section 12 of the Act; (b) that the permission given by the Minister was therefore a necessary permission granted with retrospective effect in the exercise of the powers under section 18 of the Act, which took

effect according to its terms, and validly limited the number of caravans permitted to be stationed on the land to 21; (c) that the further increase in the number of caravans on the land making the total in excess of 21 was a development of the land carried out without permission under the Act.

It was contended by the appellants: (a) that the use of the land as a whole on July 1, 1948, was as a camping and caravan site and that the increase in the number of caravans on the land, which had occurred thereafter, did not amount to a material change of that use; (b) that, accordingly, the appellants did not require the permission for which they applied in 1955 and the permission which the Minister purported to grant was of no effect; (c) that there was no limit to the number of caravans which could lawfully be stationed on the land save that contained in the licence granted under the Public Health Act, 1936.

The justices held that the increase in the number of caravans from eight to 27 did not, in the circumstances, constitute a material change of the use of the land, and quashed the enforcement notice. The respondents appealed to the Divisional Court. The Divisional Court held, following its own decision in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour Ltd.*,[2] that the justices had had no jurisdiction under section 23 (4) of the Act of 1947 to determine whether there had in fact been development within section 12 of the Act or not and the Divisional Court discharged the order of the justices.

The appellants appealed. Before giving judgment the Court of Appeal heard the appeal in the *Eastbourne* case.[2] The Court of Appeal, having reversed the decision of the Divisional Court in that case,[3] proceeded to give judgment on this appeal.

R. E. Megarry Q.C. and *Bernard Marder* for the appellants.

Nigel C. Bridge for the respondents, the local authority.

J. D. James held a watching brief for the Eastbourne Corporation.

The following cases were cited in argument which were not referred to in the judgments: *Perrins* v. *Perrins*[4]; *Francis* v. *Yiewsley & West Drayton Urban District Council*[5]; *Norris* v. *Edmonton Corporation*[6]; *Lincolnshire (Parts of Lindsey) County Council* v. *Wallace Holiday Camp Ltd.*[7]; *Keats* v. *London County Council*[8]; *Taylor* v. *Eton Rural District Council*[9]; *Fyson* v. *Bucks County Council*[10]; *East Riding County Council* v. *Park*

[2] [1958] 2 Q.B. 41; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

[3] Ante, p. 630.

[4] [1951] 2 K.B. 414; [1951] T.L.R. 945; [1951] 1 All E.R. 1075.

[5] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

[6] [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801.

[7] [1953] 2 Q.B. 178; [1953] 2 W.L.R. 1088; sub nom. *Lincoln County Council (Parts of Lindsey)* v. *Henshall* [1953] 1 All E.R. 1143.

[8] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[9] (1958) 9 Tax Planning & C.R. 430.

[10] [1958] 1 W.L.R. 634; [1958] 2 All E.R. 286.

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Estates (Bridlington) Ltd.[11]; *Brooks* v. *Flintshire County Council*[12]; *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[13]; *Stepney Borough Council* v. *Joffe*[14]; *Postill* v. *East Riding County Council.*[15]

Cur. adv. vult.

March 23. The following judgments were read.

Lord Evershed M.R. These two appeals raise precisely the same questions, namely: first, whether the justices at Woking had jurisdiction under the Town and Country Planning Act, 1947, to inquire into and determine whether there had in fact been development on the land owned and occupied by the appellants, within the meaning of section 12 of the Act; and second, if so, whether they were entitled to conclude, as they did, that there had not been any development. In the circumstances, Mr. Megarry confined himself in argument to the appeal by Mr. and Mrs. Penny, the owners of the land in question; and this judgment is similarly confined in terms.

The facts appear from the case stated and may be briefly summarised as follows. The appellants, Mr. and Mrs. Penny, are the proprietors of 1½ acres of land within the jurisdiction of the respondents, the Guildford Rural District Council, as the appropriate local planning authority. On July 1, 1948—the date of the coming into operation of the Town and Country Planning Act, 1947—the 1½ acres were being used (as they had been before that date and as they have continued to be used since) as a site for residential caravans. On July 1, 1948, the number of such caravans appears to have been eight, but thereafter the number steadily increased. In 1955 and 1956 recourse was had to the powers and jurisdiction of the local planning authority and (on appeal) to the Minister, the result of which was that the Minister permitted 21 caravans to be placed on the 1½ acres. The appellants, however, were not satisfied with the scope allowed by this determination on the part of the Minister; and it is not now in doubt that, in spite of the time and the trouble taken, we must determine the question before us without regard to what was then done.

When the matter came before the justices, the number of caravans on the site was 27, and the justices were of opinion that the increase in the number of caravans from eight to 27 did not, in the circumstances, constitute a material change of use of the land and they accordingly quashed the council's enforcement notice dated August 21, 1957.

The matter having then been taken, by way of case stated, to the Divisional Court, the present appellants conceded before

[11] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

[12] [1956] 6 P. & C.R. 140.

[13] [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

[14] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

[15] [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685.

that court that its recent decision in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[1] must cover this case also, and they submitted, accordingly, to an order allowing the council's appeal and setting aside the justices' order. From that order by the Divisional Court the matter has now come on appeal before this court.

On the first question, that of the jurisdiction of the justices, we have had the advantage of a full and careful argument by Mr. Megarry. Mr. Bridge, for the local authority, did not desire to contest that point; and in any event the judgments which we have now delivered in the *Eastbourne* case[2] have determined that point in the present case in Mr. Megarry's favour. There remains, however, the second question: were the justices justified in concluding, as they did, that the increase from eight to 27 in the number of caravans on this site did not amount to a material change in the user of the land? If it is open to the justices to decide the question aye or no, then according to the appellants it is a question of fact and degree, with which this court cannot interfere.

It was said by Mr. Megarry that the 1½ acres in question on July 1, 1948, were being used as a caravan site, and that their use as such has not changed materially or otherwise by the mere fact of adding to the number of caravans; and so the justices must be taken to have held. At one time during the argument the question was raised by the court whether the placing—or, to use the word sometimes used, the stationing—of caravans upon the land might constitute "other operations on land" within the formula in section 12 (2), which reads (so far as relevant): "In this Act . . . 'development' means the carrying out of "building, engineering, mining or other operations . . . on . . . "land. . . ." This point was not one taken or, indeed, put to us at all by Mr. Bridge; and on reflection I have no difficulty in rejecting it. After all, these caravans (as I understand) remain, and remain always, mobile on their wheels, and never become so attached to the land that they could fairly be regarded as equivalent to dwelling-houses of some kind.

Mr. Megarry contended that the mere intensity of user or occupation could never be relevant. As a general proposition, I am not prepared to accept that argument; nor, indeed, is it necessary to do so. Mere intensity of user may (as it seems to me; but I must not be taken as deciding this point) affect a definable character of the land and of its use—or one of them. An example was taken during the argument of some housing estate, or part of a housing estate, on which houses had been erected of a certain density per acre. If the density of the houses on that part of the estate is greatly increased, it seems to me that it may—I say no more—affect the material nature or character of the housing estate as such, or that part of it, and, therefore, of the user of

[1] [1958] 2 Q.B. 41; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

[2] Ante, p. 630.

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that part of the land. I refer also to another example taken during the argument—that of a cricket ground. If the Kennington Oval Cricket Ground were used so as to provide continuously a great number of pitches, on which boys or others could contemporaneously play cricket during the summer, no doubt the Kennington Oval would remain a cricket ground but it would be a cricket ground materially changed: it would no longer be a first-class county cricket ground but would be a cricket ground of a different kind. It is also, as it seems to me, obvious that increasing intensity of use or occupation may involve a substantial increase in the burden of the services which a local authority has to supply, and that in truth might, in some cases at least, be material in considering whether the use of the land had been materially changed.

These are questions all of which would depend upon the particular circumstances of the particular cases in which they arose for decision. They do not arise here; and I therefore express no view about them, leaving it, rather, open for future consideration when the occasion (if ever) arises. But, as I have earlier indicated, I am not able to accept, and find it unnecessary to accept, the wide and general proposition which Mr. Megarry put forward.

But none the less, all these matters—including the illustrations which I have given—are, primarily at any rate, questions of fact for the justices; and in this case there seemed to be no such points taken of the nature of the examples which I have given. So much I gather from the case itself. But a reference to the case does show this—and it is a matter which caused me some concern. Paragraph 2 of the case states, in very brief form, the relevant facts as found. The first paragraph is merely the date and fact of the enforcement notice. The second is: "The land to which "the said enforcement notice relates (hereinafter called 'the "'land') is about 1½ acres in extent. From about 1934 until "March, 1955, the land was used as a health and holiday camp. "The said use involved: (1) the construction of chalets on the "land for use as holiday homes, none of which now remains in "existence"—though, I interpolate, the date of their final disappearance is unstated—"(2) the use of the land for camping in "tents; (3) the use of the land as a site for caravans. . . ." Then the case goes on to deal with the number of caravans.

It seemed to me—and seems to me—that a health and holiday camp may well be something sensibly or materially different from a caravan site; and, indeed, so much appears from the language of the case itself, which states that of the three uses which the health and holiday camp involved only the third was that of a caravan site. Many activities might be associated with a health and holiday camp which would not be the same as its use for caravans. But, notwithstanding that statement in the case, it has never, as I understand, in the argument either in this court or before the justices, been contended that this 1½ acres of land

was used for any purpose save that of a caravan site, or that it was, save in that sense, a health and holiday camp.

It therefore comes back to this, as the question has been put and argued here and before the justices: Assuming that these 1½ acres of land were from first to last used as a caravan site, did the increase from eight caravans to 27 caravans, in the circumstances as found, constitute or amount to a material change? I can find no problem of law involved in the posing of that question. The justices, who heard the arguments and found the facts, answered the question in the negative; and in all the circumstances I conclude (as Mr. Megarry contended) that it is not open to this court to interfere with that finding of facts. I therefore would allow the appeal on both points.

SELLERS L.J. I agree with my Lord that the decision of fact in this case, whether or not there has been development, lies within the province of the justices, and that it cannot be said that they erred in law in their finding. I too, like my Lord, would not wish to be taken, however, as supporting a view that no increase or intensification of user could in any circumstances amount to a change of user. To consider the concept broadly I would take an illustration from the sea rather than one which might arise under the Town and Country Planning legislation. If a roadstead, within the control of a harbour authority, were restricted to the use at one time by only two vessels of not less than 2,000 tons, and then it became open to all vessels irrespective of tonnage or the number at anchor, then, although it remained a roadstead by its situation and nature and could be so described, the change in its user might fundamentally change its character as an anchorage, and might by its changed user make it that vessels of 2,000 tons or over could no longer safely use it by reason of the presence of other craft. A change of this sort would appear to be a material change and might affect the whole planning arrangement for vessels using a port. I have not sought to visualise circumstances which might arise on land.

I agree with my Lord that this appeal should be allowed on both points.

LORD EVERSHED M.R. I am authorised by ORMEROD L.J. to say that he also agrees with the conclusions of my brother and myself.

Appeals allowed.

Solicitors: *Garber, Vowles & Co.; Jaques & Co. for Barlow, Norris & Jenkins, Guildford; Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

KAHN *v.* NEWBERRY.

1959
April 10, 13.

Lord Parker C.J., Donovan and Salmon JJ.

Shop—"Place" in which retail trade carried on—Mobile trader—Weekday closing—Costermonger's barrow—Whether "any place "not being a shop"—Whether distinction between Sunday and weekday closing—Whether piece of ground constituted "place" by casual retail sale—Degree of permanency necessary—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 12 (1), 58.

Evidence—Judicial notice—Object—Judicial notice that costermonger's barrow moves.

Judicial Precedent—Scottish decision—Construction of common statute—Shops Acts.

Between 10.20 and 10.25 p.m. on a weekday the defendant was standing beside a stationary costermonger's barrow on a pitch in a London street when he sold apples to two different customers. He was convicted of unlawfully carrying on a retail trade or business in a "place" not being a shop at a time when it would be unlawful to keep a shop open for the purposes of a retail trade or business contrary to section 12 of the Shops Act, 1950. On appeal:—

Held, that the sales were not carried on in a "place" within the meaning of section 12 and that, accordingly, no offence had been committed.

There was no distinction between the costermonger's barrow and the mobile van in *Stone* v. *Boreham* (infra), for it required more than a casual sale to constitute a piece of ground a place where a retail trade or business was carried on. Nor could any distinction be drawn in that respect between the wording of sections 12 and 58 of the Shops Act, 1950, both of which contemplated a degree of permanency and, therefore, the court was bound by the English decisions under section 58 of the Act of 1950 and section 13 of the Shops (Sunday Trading Restriction) Act, 1936, which it re-enacted, and should not follow the Scottish decisions under section 12 of the Act of 1950 and section 9 of the Shops Act, 1912.

Stone v. *Boreham* [1959] 1 Q.B. 1; [1958] 3 W.L.R. 209; [1958] 2 All E.R. 715, and *Eldorado Ice Cream Co. Ltd.* v. *Keating* [1938] 1 K.B. 715; [1938] 1 All E.R. 330 applied.

Nixon v. *Capaldi,* 1949 S.C.(J.) 155 and *Cowlairs Co-operative Society Ltd.* v. *Glasgow Corporation,* 1957 S.C.(J.) 51 not followed.

Quaere: Whether, had the barrow had a fixed location, it would have been a "place" within the meaning of sections 12 and 58 of the Act of 1950.

CASE STATED by London Sessions Appeals Committee.

The defendant, Bidrich Kahn, appealed to quarter sessions against his conviction, by Westminster justices, on a summons laid by Edwin Walter Newberry (a duly authorised officer acting on behalf of the London County Council) alleging that he, on May 6, 1958, in a place not being a shop, namely, a pitch on the east side of Great Windmill Street, W.1, did unlawfully carry on a retail trade or business after the hour of 8 p.m., being a time when it would be unlawful in that locality under

section 2 of the Shops Act, 1950, to keep a shop open for the purposes of retail trade or business, contrary to section 12 of the Act,[1] the retail trade or business (the sale of apples) not being a transaction mentioned in the Second Schedule to the Act.

The following were among the facts found by quarter sessions. On May 6, 1958, the defendant between 10.20 p.m. and 10.25 p.m. was standing beside a stationary costermonger's barrow on a pitch in Great Windmill Street, W.1, on the east side about five yards north of the junction of Coventry Street, W.1, when he sold several apples to two different customers. The defendant was carrying on a trade or business not being a transaction mentioned in the Second Schedule to the Shops Act, 1950. The costermonger's barrow was not a moving vehicle.

It was contended for the defendant that the costermonger's barrow was a moving vehicle and as such was not liable to the provisions of the Act of 1950.

It was contended for the prosecutor that a stationary costermonger's barrow was not a moving vehicle and was a place within the meaning of sections 2 and 12 of the Shops Act, 1950, and that the pitch on which retail trade or business was carried on from a stationary costermonger's barrow was a place within the meaning of those sections.

Quarter sessions were of the opinion that the defendant was engaged in carrying on a retail trade or business after 8 p.m. in a place not being a shop in a locality where it was unlawful to keep open a shop for the purposes of retail trade or business and, accordingly, dismissed the appeal.

The defendant appealed.

The defendant appeared in person.

Paul Wrightson for the prosecutor.

The cases cited in argument are mentioned in the judgment of Donovan J.

LORD PARKER C.J. I will ask Donovan J. to give the first judgment.

[1] Shops Act, 1950, s. 2 (1) (as amended by the Shops (Revocation of Winter Closing Provisions) Order, 1952 (S.I. 1952, No. 1862): "Every "shop shall be closed for the serving "of customers . . . not later than nine "o'clock in the evening on the late "day and eight o'clock in the evening "on any other day of the week; . . ."

S. 12: "It shall not be lawful in "any locality to carry on in any "place not being a shop retail trade "or business of any class at any "time when it would be unlawful in "that locality to keep a shop open "for the purposes of retail trade or "business of that class, and, if any "person carries on any trade or busi-"ness in contravention of this "section, this Part of this Act and "the provisions in Part V for the "enforcement of this Act shall apply "as if he were the occupier of a shop "and the shop were being open in "contravention of this Part of this "Act."

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v.
Newberry.

Donovan J. This is an appeal by way of case stated from a decision of the Appeals Committee of the London Sessions dismissing an appeal by the defendant against his conviction by the Westminster justices for trading in contravention of the terms of section 12 of the Shops Act, 1950.

The case finds that the defendant on May 6, 1958, sold apples from a barrow which was stationary at the time in Great Windmill Street. Section 12 so far as is relevant for present purposes provides: "It shall not be lawful in any locality to "carry on in any place not being a shop retail trade or business "of any class at any time when it would be unlawful in that "locality to keep a shop open for the purposes of retail trade "or business of that class." Section 2 of the same Act makes it unlawful for a shop to keep open for the serving of customers after nine o'clock in the evening on the late day and eight o'clock on any other day. The defendant, however, was serving apples from his barrow in Great Windmill Street between 10.20 p.m. and 10.25 p.m.

The appeals committee find that this business was not one of those exempted from the closure provisions of the Act by the Second Schedule, and they further find that the defendant's costermonger's barrow was not a moving vehicle. Without giving reasons the appeals committee decided that the defendant was in breach of section 12 and dismissed his appeal. He now contends that they should have allowed it, and he relies upon the recent decision of this court in *Stone* v. *Boreham*.[1] Prior to that decision there were other cases on the same or a similar point, two in Scotland and one in England. In 1938 this court decided *Eldorado Ice Cream Co. Ltd.* v. *Keating*[2] and held that a movable box-tricycle from which ice cream was being sold was outside the relevant provisions of the Shops (Sunday Trading Restriction) Act, 1936. Section 11 (1) of that Act provided: "No person shall be employed on Sunday "about the business of a shop which is open for the serving "of customers on that day unless the following requirements "are complied with," and then followed certain requirements which provided for extra time off for the employees. Section 13 of the same Act provided: "The provisions of this Act shall "extend to any place where any retail trade or business is "carried on as if that place were a shop."

This court in the *Eldorado* case[3] was dealing with a decision by the justices that "each of the two box-tricycles from which "sales were so made was 'a place' where retail trade or busi-"ness was carried on under section 13 . . . and, therefore, was "to be treated as a shop." The court held that that was wrong and that the box-tricycle was not such a place. Lord Hewart

[1] [1959] 1 Q.B. 1; [1958] 3 W.L.R. 209; [1958] 2 All E.R. 715.

[2] [1938] 1 K.B. 715; 58 T.L.R. 356; [1938] 1 All E.R. 330.

[3] [1938] 1 K.B. 715.

C.J. in giving the decision of this court said[4]: "The contention "is boldly made, not that the warehouse was a 'shop' or that "the particular spot at which at a given time a box-tricycle "was to be found was a 'shop,' but that each of the movable "box-tricycles itself was a 'place' within the meaning of section "13 'where retail trade or business was carried on.' The Act "of 1936 begins with a provision about the closing of shops and "the serving of customers in shops, and section 11 contains the "words"—and then he quotes them—"It becomes clear, when "one looks at the whole scheme and purpose of the Act, that "it is essential that the place where the employment is carried "on, to be a 'place' within section 13, must be either a shop "or premises akin to a shop. Section 13 does not provide that "any retail sale, wherever it may be made, shall come within "the meaning of the Act. It does not prohibit the transaction "of selling by retail. To re-read section 11 as the argument "seeks to extend it is to produce some such result as that 'no "'person shall be employed on Sunday about the business of "'a box-tricycle which is open for the serving of customers on "'that day unless the following requirements are complied with.' "But the terms of section 13 are that the 'place' referred to "in that section is 'any place where any retail trade or business "'is carried on,' not merely the apparatus by means of which, "or the thing through which, any trade is carried on. So, in "proviso (*b*) to section 13 are found the words 'persons wholly "'or mainly employed in connection with the retail trade or "'business carried on thereat,' that is, at a shop. Throughout "these sections one finds words which connote defined and fixed "locality and position and one also finds in the schedule to "the Shops Regulations, 1937, made under the Act, that the "Form of Record of Sunday Employment and Holidays to be "kept under section 12 of the Act requires (inter alia) that the "address of the shop or place should be stated. What would "be the address of the box-tricycle?" Then he goes on to say that the box-tricycle was not such a place, and the appeal was allowed.

Eleven years later, in 1949, *Nixon* v. *Capaldi*[5] came before the Court of Justiciary in Scotland. That arose under the provisions of section 9 of the Shops Act, 1912, which provided: "It "shall not be lawful in any locality to carry on in any place not "being a shop retail trade or business of any class at a time "when it would be unlawful in that locality to keep a shop "open for the purposes of retail trade or business of that class." It may be noted at the outset that this Act was not dealing simply with Sunday trading as was the Act of 1936 under which the *Eldorado* case[6] arose. But it is difficult to see any material difference in the wording of the respective sections. The Act of 1936 by section 13 was also dealing with a place not being

[4] [1938] 1 K.B. 715, 721.
[5] 1949 S.C.(J.) 155.
[6] [1938] 1 K.B. 715.

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a shop because the section provides that the Act shall apply "as if that place were a shop." Furthermore, the kind of "place" which each Act has in view is described in similar language. In each case it must be a place where retail trade or business is carried on. The Court of Justiciary held that in selling ice cream from a mobile van outside permitted hours the defendant Capaldi was in breach of section 9 of the Act of 1912 because, in their view, he was carrying on a retail trade or business in a place not being a shop. The Court of Justiciary were obviously not impressed with the English decision in the *Eldorado* case [6] and certain distinctions were tentatively suggested. Thus, Lord Mackay said [7]: "I agree with what "your Lordship has said about that decision. It dealt with a "wholly different and English Act. The statute in England was "not dealing with the closing of shops in order that employees "should not be over-employed or with any similar topic. It "dealt with releasing Sunday trading restrictions under old "English Acts, and that a releasing only to a limited extent. "It may be that the same words 'place other than a shop' "have to receive one construction in a Scottish statute and a "different construction in an English statute inasmuch as each "of these statutes deals with quite a different evil. If, however, "it should fall to me to choose between the reasoning of the "two learned sheriffs in Scotland and that of the Lord Chief "Justice in England, I should certainly agree with the Scottish "decisions, in respect, inter alia, that they correctly bring into "play the main purpose of the statute and the mischief it is "supposed to remedy." The reference there to the two sheriffs refers to two previous decisions by such sheriffs similar to that of the Court of Justiciary in the subsequent case of *Nixon* v. *Capaldi*.[8]

I have set out above the language of the relevant sections in each of the two statutes from which, as I have said, it is difficult to detect any difference which is crucial.

Then came another case in Scotland, namely, *Cowlairs Co-operative Society Ltd.* v. *Glasgow Corporation*.[9] That did arise under the Shops Act, 1950, which consolidated the various statutes on this subject-matter. The co-operative society were also prosecuted under section 12, as is the defendant in this case, and it was held that in carrying on a retail grocery trade from a mobile shop on a vacant piece of land held on a ninety-nine year lease and on a half day when other grocers' shops had to be closed in the locality, the society was in contravention of section 12. The van was towed to the vacant land each morning and towed back to its garage at night. The society argued that there was sufficient permanence about the arrangement to constitute the van "a shop" and it was therefore not within the scope of section 12 which refers to "any place not being a shop." This

[6] [1938] 1 K.B. 715.
[7] 1949 S.C.(J.) 155, 160.
[8] 1949 S.C.(J.) 155.
[9] 1957 S.C.(J.) 51.

argument the Court of Justiciary rejected, holding that the fundamental idea in the definition of a shop for the purposes of the Act was that the trading must be carried on from premises and the van could not be regarded as "premises." There was a subsidiary argument for the society based on the right to elect for early closing on Saturday, which is not relevant here. There was naturally no argument to the effect that the van was not "a place from which retail trade or business was carried on" because the contrary had already been decided in Scotland in *Nixon* v. *Capaldi*.[10]

Finally, last year this court decided *Stone* v. *Boreham*.[11] That arose under sections 58 and 74 of the Shops Act, 1950. Section 58 reproduced the effect at any rate of section 13 of the Sunday Trading Act, 1936. The section is found in Part IV of the Act dealing with Sunday trading, and it provides that with certain specified exceptions, which are not here material, "the foregoing provisions of this Part of this Act . . . "shall extend to any place where any retail trade or business "is carried on as if that place were a shop." Then section 74 (1) defines "shop" as including "any premises where any "retail trade or business is carried on." Accordingly a "place" where such trade is carried on, even if it is not a shop within the definition, for example because there are no "premises," is to be treated as if it were a shop for the purposes of section 58. In *Stone* v. *Boreham*[11] a mobile van equipped as a mobile shop and stocked with a variety of goods stopped in a street on a Sunday and the owner sold a packet of tea to a customer standing in the roadway. If the mobile van or the site it occupied were "a place where any retail trade or business is carried "on" within the terms of section 58 an offence was committed (see section 47 of the Act). The argument for the appellant in that case was not that the van was such a place because that contention was precluded by the decision in the *Eldorado* case,[12] but that the ground upon which the van rested at the time was such a place. That argument likewise failed, and Lord Goddard C.J. said[13]: "I say at once, both with regard to the "definition of 'shop' in section 74 and section 58, that the "effect of those sections is not to say that a retail trade or "business is carried on in a mobile shop. At a mobile shop "no doubt retail sales are made, but that is different from "saying that a retail trade or business is carried on. A man "carries on business from an address. I do not think those "words apply to a mobile van of this sort. It is unnecessary to "examine in detail the various Shops Acts or the Scottish cases "on this subject, because in my opinion the decision of this court "in *Eldorado Ice Cream Co. Ltd.* v. *Keating*,[14] on which the "justices relied, is binding on us. Whether, if the case was res

[10] 1949 S.C.(J.) 155.
[11] [1959] 1 Q.B. 1.
[12] [1938] 1 K.B. 715.
[13] [1959] 1 Q.B. 1, 7.
[14] [1938] 1 K.B. 715.

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"integra, we might come to a different decision I need not in-"quire." He went on to say that it would be really fanciful to distinguish the *Eldorado* case [14] on the ground that there the court was concerned with the box-tricycle itself whereas here it was concerned with the ground upon which the mobile van stood, and with that view Slade J. and Devlin J. agreed. It should be said, however, that Slade J. remarked [15] that if the matter had been res integra he would have decided otherwise, being impressed by the Scottish decision in *Nixon* v. *Capaldi*.[16] Devlin J., on the other hand, preferred the English decision in the *Eldorado* case [17] to that in *Nixon* v. *Capaldi* [18] for reasons which he gave in these terms [19]: "The Act is to extend not to any place where "the sale happens to be effected but to a place where the retail "trade or business is carried on. Here the place is alleged to "be an area in Peterhouse Crescent, Woodbridge, situate outside "No. 106. It might also have been a dozen or a score of "similar places where other sales happened to be effected. Is "that a place where any retail trade or business is carried on? "Is each of them such a place? I think so to hold would be "to strain the meaning of the Act in order to produce a result "that is not in accordance with common sense. There are so "many sections of the Act which seem to me to make it clear "that section 58 has in mind a place where business is carried "on in the ordinary sense of the word and not where any trader "happens to effect a sale in the course of his business, there "being to my mind a clear distinction between the two. No "better section could be introduced as illustrative of that than "the very section under which this prosecution was brought, "section 47, which says: 'Every shop shall, save as otherwise "'provided by this Part of this Act, be closed for the serving "'of customers on Sunday.' The requirement of closure makes "it plain that the place is something which is fixed, a place "where business is carried on, and not a place where a casual "sale happens to be effected. I think the ordinary man could "not make sense of a requirement of the law that he was re-"quired in the words of this information to close a place being "a part of Peterhouse Crescent outside the dwelling-house No. "106. I think it is very undesirable that this court should strain "to give meanings to a section of the Act which would produce "a result incomprehensible to the traders who have to deal with "it. The result is, I think, that it must now be taken as "definitely decided in these courts that a mobile van is not a "shop within the meaning of the Shops Act, 1950, and if "Parliament desires to make it so it must introduce new legisla-"tion for that purpose."

Although, in the case now before us, the appeals committee found that the defendant's barrow was not a moving vehicle, it

[14] [1938] 1 K.B. 715.
[15] [1959] 1 Q.B. 1, 8.
[16] 1949 S.C.(J.) 155.
[17] [1938] 1 K.B. 715.
[18] 1949 S.C.(J.) 155.
[19] [1959] 1 Q.B. 1, 10.

is common knowledge that a costermonger's barrow is something on wheels and is pushed about. The committee can, I think, mean no more than this, that the barrow was not moving at the time of the sale, which is in no sense a decisive consideration and, although this is not in the case, the defendant tells us, and we can well believe it, that he has to move about, particularly on the appearance of a policeman. If the barrow is treated as a mobile counter, I can see no relevant distinction between the present case and *Stone* v. *Boreham*.[20] Mr. Wrightson says that that decision and the decision in the *Eldorado* case [21] were decisions dealing with Sunday trading, whereas the two Scottish decisions and the present case deal with weekday trading, and different statutes at any rate originally were involved. That is quite true. For that reason I have referred to the actual wording of the respective provisions and I find no such difference as would, in my opinion, justify this court in not following the decision in *Stone* v. *Boreham*.[22]

Two things perhaps might finally be said. First, the present case is not one where a stall is regularly erected on the same piece of land so that an aspect of some permanency is given to the site as one where goods are regularly sold by retail. It may be that such a place would be within the language of section 12 and section 58 of the Shops Act, 1950. That case can be left to be decided if and when it arises. Secondly, the case of the itinerant hawker is not, in my view, the case which Parliament had in mind in passing the various Shops Acts. I say that because of the language of those Acts, which, as has been pointed out before in this court, seems to contemplate shops in the ordinary sense of the word, and other places not being shops but with sufficient aspect of permanence about them to warrant them being treated as shops, and also because, although this court held over 20 years ago that a mobile selling vehicle was not within the Shops Act, Parliament has taken no steps to bring such a contrivance within this legislation. In Scotland it would seem that the view has been taken that no undue straining of the words of the Acts is required to achieve this result. In England the opposite view has prevailed. I think that the court must follow the English view and that involves that this appeal must be allowed.

SALMON J. I agree with everything that has fallen from my Lord, and there is nothing which I can usefully add.

LORD PARKER C.J. I have come to the same conclusion. In particular, after reading the two material sections in the Shops Act, section 12 and section 58, dealing respectively with what I may call weekday trading and Sunday trading, I can find no material distinction. It seems to me that the test or criterion to

[20] [1959] 1 Q.B. 1.
[21] [1938] 1 K.B. 715.
[22] [1959] 1 Q.B. 1.

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be applied in deciding whether a piece of ground is a place where retail trade or business is carried on is the same under both sections. That being so, it follows, I think, that this court is bound by the English decisions to which Donovan J. has referred and, in particular, by the decision of this court in *Stone* v. *Boreham*.[23] Looked at in that way, I can see no distinction between the barrow in the present case and the mobile van in *Stone* v. *Boreham*[23] except to a slight degree. I would, like my Lords, specifically reserve for a future occasion the question whether if a barrow had a fixed location either by practice or by licence it would come within the sections. It seems to me, as at present advised, that the only real difference between the decisions in England and in Scotland turns on the degree of permanency necessary. If one looks at the judgments of Lord Goddard C.J. and Devlin J. in *Stone* v. *Boreham*,[24] I think that becomes quite clear. The English decisions emphasise that it requires more than a casual retail sale to constitute a piece of ground the place where a retail trade or business is carried on, whereas Scotland has gone the length of saying that any place from which a casual sale is carried out is a place within the section. I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *J. G. Barr, Solicitor, London County Council.*

J. F. L.

[23] [1959] 1 Q.B. 1. [24] Ibid. 6, 9.

[HOUSE OF LORDS.]

H. L. (E.)*

1959 *Mar.* 9, 10, 11, 12; *April* 16.

GOUGH . . . . . Appellant;

AND

NATIONAL COAL BOARD . . . . . Respondents.

Mines and Minerals—Coal—Breach of statutory duty—Roof and sides—Fall of coal from coal face—Duty to make secure side of working place—Whether coal face a "side"—Meaning of "secure"—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49.

House of Lords—Retrial—No finding by judge on one issue—Question of fact—Point reserved but not argued—Retrial refused.

By section 49 of the Coal Mines Act, 1911: "The roof and sides "of every travelling road and working place shall be made secure, "and a person shall not, unless appointed for the purpose of explor-"ing or repairing, travel on or work in any travelling road or "working place which is not so made secure."

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* *Present*: Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning.

By section 102 (8): "The owner of any mine shall not be "liable to an action for damages as for breach of statutory duty in "respect of any contravention of or non-compliance with any of the "provisions of this Act if it is shown that it was not reasonably "practicable to avoid or prevent the breach."

A ripper was employed by the mine owners at a coal face worked on the "long wall" system. While walking along the coal face he was injured by a large lump of coal which was dislodged from the top of it. In an action against the mine owners for damages he alleged breach by them of the statutory duty imposed by section 49. The mine owners contended that the coal face was not a side of the working place within section 49, and also relied on section 102 (8). The trial judge having found in their favour on the first point, they did not require him to give a decision on the second. The Court of Appeal having affirmed his decision, the ripper appealed to the House of Lords:—

Held, that the coal face was a "side" of a working place within section 49 and, that, accordingly, the mine owners were in breach of their statutory duty in failing to make it secure. Section 49 must be applied subject to the fact that the object of mining was to get coal, and could not be construed so as to compel the support of that which was to be brought down, but the sides, including the coal face, must be made "secure" in the sense that there would be no danger from accidental or unintended falls.

Elliot v. *National Coal Board*, 1956 S.C. 484 overruled.

Held, further (Lord Morton of Henryton and Lord Somervell of Harrow dissenting), that on the second issue the case should not be sent back for a retrial. The respondents sought to rely on section 102 (8) and must prove their case. The respondents had not required the trial judge to make a finding and they must accept as it stood the evidence, on which it could not be held that they had discharged the onus on them.

Decision of the Court of Appeal [1959] 1 Q.B. 189; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 754 reversed.

APPEAL from the Court of Appeal (Lord Goddard C.J. and McNair J., Morris L.J. dissenting).

This was an appeal by the appellant, Richmond Gough, who was plaintiff in the action, from an order of the Court of Appeal dated February 28, 1958, whereby a judgment given on June 21, 1957, by Salmon J. in favour of the respondents, the National Coal Board, who were defendants in the action, was affirmed.

The facts are fully set out in the opinion of Lord Morton of Henryton.

Gerald Gardiner Q.C. and *A. E. James* for the appellant.
John Thompson Q.C. and *George Mynett* for the respondents.

The only cases cited in argument were: *Edwards* v. *National Coal Board*[1]; *Marshall* v. *Gotham Co. Ltd.*[2]; *Boyd* v. *National Coal Board*[3]; *Penny* v. *National Coal Board*[4]; *Green*

[1] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.
[2] [1954] A.C. 360; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.
[3] (1954) Unrep. Dec. 14 (Swansea Assizes).
[4] (1955) Unrep. Jan. 27 (Newcastle-upon-Tyne Assizes).

v. *National Coal Board*[5]; *Walsh* v. *National Coal Board*[6]; *Elliot* v. *National Coal Board*[7]; *Young* v. *National Coal Board*[8] and *McCarthy* v. *Lewis*.[9]

Their Lordships took time for consideration.

April 16. Lord Morton of Henryton. My Lords, in this case the appellant, plaintiff in the action, claims damages for breach of statutory duty by his employers, the respondent board. Alternatively he claims damages for negligence at common law. The statutory duty in question is imposed by section 49 of the Coal Mines Act, 1911. This section is the first of a group of four sections which appear under the cross-heading "Support of roof "and sides," and is as follows: "The roof and sides of every "travelling road and working place shall be made secure, and a "person shall not, unless appointed for the purpose of exploring "or repairing, travel on or work in any travelling road or working "place which is not so made secure." With this section should be read section 102 (8) of the Act, which provides: "The owner "of a mine shall not be liable to an action for damages as for "breach of statutory duty in respect of any contravention of or "non-compliance with any of the provisions of this Act if it is "shown that it was not reasonably practicable to avoid or prevent "the breach." Section 50 (1) and (2) of the Act should also be quoted. They are as follows: "(1) Where props or props and "bars or chocks are used to support the roof at the working face, "the roof under which any work of getting coal or filling tubs is "carried on shall be systematically and adequately supported, and "the props or chocks shall be set at such regular intervals and in "such manner as may be specified in the notice hereinafter men-"tioned. (2) Holding props or sprags shall be set as soon as "practicable, and shall be set at such regular intervals and in "such manner as may be specified in the notice hereinafter "mentioned, and shall not be removed until the coal is about to "be taken down and before the roof supports (if any) have been "advanced in the manner specified in the notice."

The facts of the case, as found by the learned trial judge, Salmon J., were as follows: "The plaintiff . . . was an under-"ground worker in the defendants' coal mine at the Granville "Colliery. He was employed there as a ripper, and had many "years' experience underground at the time of the accident. He "met with an accident on the day shift on December 2, 1955, in "circumstances which I shall, in a moment, describe. At this "pit there was a coal face known as B panel double face, and "it was being worked on what is described as a long wall system.

[5] (1955) Unrep. Dec. 20 (Leeds Assizes).

[6] [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; [1955] 3 All E.R. 632.

[7] 1956 S.C. 484.

[8] (1956) Unrep. July 5 (Court of Session, Lord Wheatley).

[9] [1957] 1 Q.B. 475; [1957] 2 W.L.R. 300; [1957] 1 All E.R. 556.

"There was, I find, one hundred and fifty yards of this coal face "approximately six feet high being worked in the mine. Prior "to the accident the system had been to have three shifts. There "was what is known as the afternoon shift, which worked approximately from three till ten-thirty p.m., and which was known as "the cutting shift. During that shift a cut by mechanical cutter "was made into the face of the seam to a depth of about four and "a half feet, and the cut was about six inches from the ground. "The second shift was the night shift, which came on at about "ten-thirty in the evening until seven o'clock in the morning. The "function of that shift was filling off; that is to say, their job was "to win and bag the coal that had been cut by the afternoon "shift. Then the third shift was known as a day shift. It came "on at about seven o'clock in the morning and worked till about "three in the afternoon. That shift had the job of advancing the "rails and the roof and generally clearing up after the night shift. "The plaintiff was a member of the third shift, the day shift. "On the day in question, December 2, 1955, it appears that owing "to some fault in the conveyer the night shift had not completed "the task of filling off the coal, and the deputy in charge of the "day shift, a man called Reece, decided—and rightly decided—"to complete their task. He detailed the plaintiff, amongst "others, to go along the face and help fill off the coal. I find "that the plaintiff came along what has been described as the "approach road, which is shown as Exhibit P.1, turned to his "right and walked along the face for a distance of about fifty "yards. He was walking about four feet from the face of the "coal. After he had gone a distance of fifty yards, or there-"abouts, a piece of coal about twelve feet long by two feet six "inches thick came away from the top of the coal face. I find "that it came away from a point two feet six inches from the "roof. He was buried by this coal and suffered quite a serious "injury."

The first question arising for decision by the learned judge was whether the coal face, from which this large piece of coal fell, was a "side of a working place," within the meaning of section 49 of the Act. If so, it was clear that it had not been "made "secure," since the fall occurred. The learned judge held [1] that "this section cannot be intended to apply to the coal face because "the whole object of mining is to take down the coal face; there-"fore, a section that refers to an obligation to make secure the "sides of a working place, and prohibits anyone from working in "such a place which has not been so made secure, cannot, in my "judgment, be intended to apply to the coal face itself." He then reviewed the evidence and held that the board had not been negligent and dismissed the action but assessed the damages at £600, if they had been recoverable. The Court of Appeal, by a

[1] [1957] 1 W.L.R. 973, 975; [1957] 3 All E.R. 368n.

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majority (Lord Goddard C.J. and McNair J., Morris L.J. dissenting) affirmed the decision of the learned judge on both points.

My Lords, to my mind the question whether a working coal face can be a "side" within the meaning of section 49 of the Act of 1911 is one of great difficulty. The view that it cannot was powerfully put by Lord Cameron in *Elliot* v. *National Coal Board*,[2] and by McNair J. (with whose judgment Lord Goddard agreed) in the present case. In the end, however, I came to the contrary conclusion, and I was in course of putting my reasons on paper when I had the privilege of reading in print the speech which is about to be delivered by my noble and learned friend, Lord Reid. I entirely agree with his reasoning and conclusion on this point, and I shall not detain your Lordships by stating the same reasons in different words. In my opinion, the coal which injured the appellant fell from a "side" of a "working place" and there was a breach by the board of its statutory duty to make that side secure. This being so, the question arises whether it has been shown by the board that "it was not reasonably practicable to "avoid or prevent the breach" within section 102 (8) of the Act. Paragraph 4 of the defence of the board was in the following terms: "If (contrary to their contention) the defendants were in "breach of their statutory duty they will rely upon section 102 "(8) of the said Act that it was not reasonably practicable to "avoid or prevent such breach." The board was asked to give, and did give, particulars under this paragraph. Salmon J. made no finding upon this point, which did not arise because he held that there has been no breach of statutory duty by the board. The point had to be dealt with, however, by Morris L.J., since he thought, as your Lordships do, that there had been a breach of section 49. That learned Lord Justice expressed the view that there should be a further hearing, presumably by the learned trial judge, in order to decide the question arising on section 102 (8). My Lords, I entirely agree with that view. Your Lordships are all of opinion, as I am, that the evidence failed to establish a case of common law negligence against the board. Thus the result of this appeal depends entirely on the question whether or not it was reasonably practicable to avoid or prevent the breach of section 49 which resulted in injury to the appellant. If the answer is "Yes" the appeal succeeds and the appellant is entitled to £600 damages. If the answer is "No" the appeal should be dismissed.

This question is one of fact for the learned trial judge, on which oral evidence, conflicting to some extent, was given before him, but it did not become necessary for him to express an opinion upon it. I cannot attach blame to the board or its counsel for failing to ask the judge to determine a question which did not arise in view of his decision on other points, and he might quite properly have refused to determine it. It is, in my view,

[2] 1956 S.C. 484.

impossible to say what view he would have formed on the question arising on section 102 (8), and that question now comes, for the first time, into the forefront of the case.

I would remit the case to the learned trial judge to find whether or not it was reasonably practicable for the board to avoid or prevent the fall of coal whereby the appellant suffered damage. As I take this view, it would not be right for me to make any comment upon the evidence bearing upon this issue.

No final order should be made on this case until the learned judge has made this further finding.

LORD REID. My Lords, this is an action for damages for injuries sustained by the appellant on December 2, 1955, in Granville Colliery, Shropshire. The appellant's injury was caused by a large piece of coal falling on him while he was walking along the coal face. The depth of the seam at this point was about 6 feet and the face was about 150 yards long. It was being worked on the long wall system with coal cutters. The work was done by three shifts, the cutting shift under-cut the coal, then the filling shift brought down the coal which had been under-cut and removed it by a conveyer, and then the ripping shift made the necessary preparations for the next cutting shift.

The appellant was working on the ripping shift. On this occasion, owing to some difficulty with the conveyer, the filling shift had not completed their work and this had to be finished by the ripping shift before their normal work could start. The appellant had been told to go along the face to a point where he was to bring down some of the coal which had been left there. It was on this journey that he was struck by the piece of coal which injured him. It fell from some point on the face.

The appellant alleged both breach of statutory duty and negligence at common law. He failed on both grounds at the trial before Salmon J. and his appeal was dismissed by the Court of Appeal (Lord Goddard C.J. and McNair J., Morris L.J. dissenting). On the first ground breach of section 49 of the Coal Mines Act, 1911, is alleged. [His Lordship read the section and continued:]

Admittedly, the place where the appellant was walking when he was injured was a working place within the meaning of this section, and his case is that the face from which the coal fell was a "side" of that working place within the meaning of the section, and that that "side" had not been made secure as the section required. It is well established that the duty under section 49 is an absolute duty so, if on a proper interpretation the face was a "side" of the working place at the time when the accident occurred, this appeal must succeed unless the respondents can establish the statutory defence to which I shall refer later; but if the face was not a "side" within the meaning of the section, the appellant could only succeed if negligence has been proved. The reasoning which led the majority of the Court of

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Appeal to hold that the face was not a "side" is briefly and clearly stated by McNair J.[3]: "It seems to me to be wholly "unrealistic and artificial to say that, when a man is employed "to bring down a face of coal in front of him, that face of coal "is the side of a working place which has to be made secure, "when the whole object of the operation is to make it insecure. "The fallacy in the plaintiff's argument seems to me to lie in the "false assumption that every working place underground has a "roof and four sides. In truth, the coal face upon which he is "operating is part of his working place itself and does not cease "to be part of his working place if, in the process of breaking in, "he makes a hole in the face and then proceeds to work either "way to the boundaries of his stint. No doubt in the progress "of his work at the face, he will, according to prudent mining "practice, insert props and sprags to provide temporary security "from the risk of falls from above him or from his sides, but "such props or sprags would not be put up in discharge of the "defendants' obligation to make the roof and sides of the working "place secure. The cutter who makes the initial cut in the face, "thus rendering the face insecure, his mate who inserts the "holding props under the uncut coal, the shot firer who in cases "of necessity still further reduces the stability of the face, are all "working in a working place, but it would be absurd, as I see it, "to hold that the statute imposes upon the defendants in all "those cases the absolute obligation of making the face secure."

There are also a number of fairly recent unreported cases and one reported case (*Elliot* v. *National Coal Board*[4]), in all but one of which a similar decision was reached for similar reasons. The exception was *Penny* v. *National Coal Board*,[5] January 27, 1955, where Byrne J. held that the face was a "side." He said: ". . . at all times there will be maintained in that place where he "works four sides, one of them being the coal that he is cutting "out. It seems to me that if any other construction were to be "put upon this section it would follow that so far as the coal face "of any mine is concerned—and I think the evidence in this case "was that the coal face was about 90 yards long—could be left "without any support of any kind without committing a breach "of the statute."

At first sight the reasoning of McNair J. is convincing, but on further consideration I have come to think that it is inadequate to deal with a variety of cases that can arise under the section, and that it proceeds on a misinterpretation of the word "secure." The argument was put by counsel in the form that the section requires you not to send men to knock down anything to which the section applies and, therefore, if a face has to be brought down, the section cannot be applied to it. I would agree with this argument to the extent that Parliament cannot have intended

[3] [1959] 1 Q.B. 189, 202–203; [1958] 2 W.L.R. 735; [1958] 1 All E.R. 759.

[4] 1956 S.C. 484.

[5] (1955) Unrep. (Newcastle-upon-Tyne Assizes).

altogether to prevent the winning of coal, and that nothing in the Act can be read in such a way as to produce this result. But before coming to what I think is the true interpretation of the section, I think it well to look at some of the consequences of reading it in the way in which it has been read.

First let me take the face at a time when it has not been undercut and when no work has been done on it. On the long wall system that will normally be the position during the ripping shift. Men will be moving the conveyer adjacent to the face and their working place, which I may call a long gallery, will be bounded on one hand by the face and on the other by the waste. Stone or other material will have been packed in the waste, and if a piece of that material falls on a man and injures him, undoubtedly there is a breach of section 49, but according to the respondents' original argument—it was somewhat modified in this House—the statute does not apply if a piece of coal falls from the face because the face is not a "side" of the working place. If it is not a "side" for the purposes of section 49, it cannot be a "side" for the purposes of any of the other statutory safety provisions, not even for the provisions requiring inspection, and it would seem to me to require very strong reasons to justify such a conclusion.

Then let me take the method of working known as pillar and stall or stoop and room. There large pillars of coal are left unworked and the miner works forward getting out the coal between the pillars. He will then have in front of him the face on which he is working and on either side one of these pillars. Are the faces of these pillars to be regarded as sides of his working place? It may be intended to work the faces of the pillars at some future time, but I would find it impossible to hold that they are not "sides" of his working place merely for that reason, and if a face, which in the ordinary use of the language would be called a "side," does not cease to be a "side" because it is to be worked in the more distant future, why should it cease to be a "side" because it is to be worked tomorrow? The need for safety provisions is just the same.

Finally, let me take the roof. It appears to me that the statutory obligation to make secure must be of the same character with regard to roofs as it is with regard to sides. As I have said, the argument is that section 49 prohibits sending men to bring down anything which it requires to be made secure. But the evidence in this case shows that every day travelling roads must be advanced as the face recedes. These roads have a higher roof than what I have called the gallery along the face, and to advance a travelling road it is necessary to bring down a part of the roof of that gallery. And there are other cases where it may be necessary to bring down a roof. Can it be said that a part of a roof which has to be brought down in the immediate future is not within the protection of section 49, or can it even be said that it ceases to be a roof as soon as work preparatory to bringing it

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down begins? I did not understand it to be argued that there never could be a working place under or nearly under a roof on which such preparatory work had begun, and if this is so, then, again, statutory protection ceases when it is most necessary.

I see nothing to prevent a face or roof being within the protection of section 49, at least down to the time when work with a view to bringing it down begins. Does it then cease at that time to be a side or roof within the meaning of the section? If it did there was no breach of the section in this case, because the face from which the coal fell had already been under-cut before the accident. But the consequences of this view would be a very severe limitation of the scope of the statutory provisions of the Act, and I do not think that we are driven to an interpretation which would have that result.

In my judgment, the respondents' argument involves an erroneous assumption as to the meaning of the word "secure" in this context. The purpose of this part of the Act is to prevent accidents, and, to my mind, "secure" here means in such a state that there will be no danger from accidental falls. The word cannot mean in such a state that the side or roof will stand up against deliberate attack, for no part of a mine can be secure in that sense. I can see nothing inconsistent in saying that a side or roof shall be made secure against accidental falls at a time when steps are being taken to bring it down deliberately. Indeed, the evidence in this case was that proper mining practice requires that great care should be taken at that stage and the statute is not silent on that matter, e.g., section 50 (2) prescribes precautions to be taken at that stage. The appellant's case at common law is that in fact insufficient precautions were then taken.

It may be that it is more difficult to make the face secure after working on it has begun, but that is a very different thing from saying that Parliament cannot have intended the provisions of section 49 to continue to apply during the progress of such work. It may be that such work will cause an accidental fall greater than was intended, and that this could not have been prevented. Absolute liability in such a case might seem unreasonable, and so it would be if it was unqualified, but section 102 (8) qualifies these absolute duties. It provides: [His Lordship read the subsection and continued:] Under the earlier legislation there was no absolute duty; for example, section 49 of the Coal Mines Regulation Act, 1887, sets out rules to be observed so far as reasonably practicable, and one of these, viz., rule 21, was in terms identical with those of section 49 of the 1911 Act. I doubt whether the change of form with regard to civil liability made any real change of substance, and any apparent difficulty about the existence of an absolute liability to make a face secure while it is being brought down is, I think, met by the provisions of section 102 (8).

In this case, the respondents seek to rely on section 102 (8) but they are under the handicap that their evidence does not

appear to have been led with the requirements of this subsection in view, and the trial judge was not asked to make any finding under it. If the respondents sought to rely on section 102 (8) it was for them to prove their case. I agree with those of your Lordships who are of opinion that no order or finding in favour of the respondents should be made on this matter and that this defence fails.

The respondents are, therefore, in my judgment, liable in damages in respect of a breach of section 49, and it is unnecessary to deal with the appellant's case at common law. Salmon J. said that he would assess the total damages at £600. This appeal ought, therefore, to be allowed, and £600 damages should be awarded to the appellant with costs.

LORD TUCKER. My Lords, the question for decision on this appeal is whether the working face in a coal mine is "a side" within the meaning of section 49 of the Coal Mines Act, 1911. [His Lordship read the section and continued:] Including the judges who have dealt with this particular case this question has been the subject of consideration by nine different judges, two Scottish and seven English, which has resulted in a majority of seven to two in favour of the view that a working face is not a side within the meaning of the section. It is true that in two of these cases the question was not the subject of actual decision. The basis of these decisions can be summarised by reference to the judgment of Lord Cameron in the Outer House in the case of *Elliot* v. *National Coal Board*[6] in which he said: "... the whole purpose of longwall mining is to cut coal by "advancing the face and to do so by progressive destruction and "removal of the face itself, a process which is the complete "antithesis of supporting and making the face secure and ... "consequently the condition as well as the function of the face "in longwall working is totally different from that of the sides "proper or the rear or waste of the working place."

This reasoning, which commended itself to Salmon J., the trial judge in the present case, and to Lord Goddard and McNair J. in the Court of Appeal, seemed to me so much in accord with common sense that I would have accepted it had I not been persuaded to the contrary view in the course of the hearing of this appeal.

My reasons can be quite shortly stated. The word "side" must, I think, have a geographical connotation. It cannot be a side at one moment and not a side at another. It seems to me impossible to say that the face is not geographically a side between shifts when, as in the present case, the working place is being used as a thoroughfare by men proceeding to

[6] 1956 S.C. 484, 486–487.

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their places for the third shift to make the necessary preparations for the next cutting of the face by the cutting shift. What then is the solution of the dilemma? It lies, I think, in the meaning of the word "secure." Security from what? I would say security from accident or unintentional collapse or falls, as distinct from security from the natural consequences of the deliberate assaults inherent in the operation of mining to which both the face and the roof are subjected from time to time.

In *Marshall* v. *Gotham Co. Ltd.*[7] I had occasion to refer to the word "secure" in a regulation identical with section 49 and said: "I agree that the word 'secure' does not "involve security from the effects of earthquake or an atom "bomb, but I think it must include security from all the known "geological hazards inherent in mining operations." I do not desire to qualify in any way what I said in that case but would only observe that deliberate assault on the mine face was not within my contemplation as a geological hazard.

For these reasons I agree that the appeal succeeds.

With regard to the order for a new trial as to whether the respondents could rely on section 102 (8) which Morris L.J. would have ordered, I am of opinion that such an order should not be made in the present case. The trial judge was not asked to make a finding on this issue and the matter was not even argued before him, counsel contenting himself with formally taking the point so as to preserve his position on appeal. In these circumstances, I think counsel must accept the evidence as it stands and content himself with endeavouring to persuade your Lordships that on such evidence the respondents have discharged the onus that lies on them under section 102 (8) and so far as I am concerned he has not succeeded in so doing. I would therefore allow the appeal and enter judgment for the appellant for the sum of £600 as assessed by the trial judge.

Lord Somervell of Harrow. My Lords, can a working face, at any rate when any part of it is being worked on, be a "side" within section 49 of the Coal Mines Act, 1911? I think the Act itself gives the answer "Yes." I read section 50, not as widening the ambit of that which has to be supported or made secure, but as applying the special procedure of specification in a notice to certain of the measures which are covered by the general words of section 49. As section 50 (2) deals with the measures which are to be taken after a working face has been undercut it follows that a working face being worked on is within section 49.

This view is confirmed by the cross heading, though I do not base my opinion on it. If I am wrong and there is no ground

[7] [1954] A.C. 360, 374–375; [1954] 2 W.L.R. 812; [1954] 1 All E.R. 937.

for restricting section 50 to measures within section 49, section 50 (2) at any rate shows that the words "shall be made secure" can have application to a working face because the purpose of the holing props or sprags is to make secure. The trackway down which the plaintiff was walking when the accident happened is, according to the plan in evidence, nearly a hundred yards long and eight to ten feet wide. The working face is a side of the trackway in the ordinary sense of the word. The trackway is a working place. It was common ground that it is not a travelling road.

The difficulty arises from the fact that the duty imposed by section 49 is one of support and the object of a coal mine is to bring down the working face. How can one support what is to be brought down?

Two rival solutions have been put forward. Counsel for the defendants in the present appeal did not argue that a working face could never be a side. He submitted that it ceased to be a side when it is being knocked down. In the present case there was no evidence that anyone was knocking down or getting coal in the stint when the fall occurred or in its immediate neighbourhood. It was at one time suggested that it ceased to be a side as soon as it became undercut. This seems, to me at any rate, doing violence to the language especially when it is recognised on all sides and by the statute that measures to make secure must follow immediately in the wake of the undercutter.

The other solution which I accept I would put in this way. The working face in the present case was and remained a side. As it was cut away it remained a side of the working place. Section 49 must, however, be applied subject to the fact that the object of mining is to get coal. To make secure is normally to support. The Act cannot be construed so as to compel the support of that which is to be brought down. On the evidence there would appear to me to be no difficulty in applying section 49 on this basis to the working face.

In the cutting shift the face was looked at to see that it was safe before the cutter started. If there were any overhanging bits they would be spragged up or knocked down. The holing props were put at regular intervals in the wake of the cutter. After the cutter had been along, the coal face would be further spragged if necessary and inspected by the deputy at the end of the shift. The next shift would fill off or bring down the coal. Further spragging is, one of the witnesses said, automatic when coal is being brought down. At the end of this shift the face would again be inspected to see if it was safe for the third shift which does the advancing of the roads and the conveyor. In the present case the filling shift were not able to fill off all the coal. It was inspected by the deputy who sounded it with his stick, saw that the holing props were

in position, and that sprags were in position, if and where necessary. So far as he could recollect no sprags other than the holing props were necessary. He came to the conclusion it was safe. The fall occurred at a place where the deputy had not anticipated any danger.

I have given this short summary of the evidence because that evidence makes it clear to my mind that there is no difficulty in applying section 49 to a working face, having regard and subject to the main purpose of getting coal. It was suggested for the appellant that a convenient formula would be to imply the words "against unintended falls" after the words "made secure." I do not quarrel with this formula but, as it is so difficult to forecast the circumstances of borderline cases, I would myself leave it in the general form in which I have stated it in the previous sentence.

On this view, there was a fall from a part of the side of a working place which should have been made secure. The defendants are therefore liable unless it can be shown that it was not reasonably practicable to avoid or prevent the fall (section 102 (8)). This defence was pleaded in the alternative. The main defence, which succeeded, was that the working face was not a side of the working place. The learned judge was not asked to make a finding as to whether the defendants could rely on section 102 (8), assuming section 49 was applicable to the place of the fall. Morris L.J., who came to the same conclusion as I have come to on the constuction and application of section 49, would have ordered a rehearing on the defence based on section 102 (8). I think that this should be done for the reasons and on the terms set out by my noble and learned friend, Lord Morton of Henryton.

Lord Denning. My Lords, section 49 of the Coal Mines Act, 1911, was not new in 1911. It was first enacted in 1872 as one of the general rules which were to be observed "so far as is reasonably practicable" in every coal mine; and it was re-enacted in 1887 in the same words, see section 51, rule 16, of the Act of 1872 and section 49, rule 21, of the Act of 1887. When Parliament in 1911 omitted the words "so far as is reasonably practicable," it might be thought that a greater liability was placed on the mine owners. But a study of the relevant provisions has satisfied me that the responsibility of the mine owners has remained the same after 1911 as it was before. Their *criminal* responsibility has throughout been qualified by the exception that they can escape responsibility by proving—and the burden is on them to prove—that they have taken all reasonable means to prevent the contravention, see the last paragraph of section 51 of the Act of 1872, section 50 of the Act of 1887, and section 75 of the Act of 1911, as explained by Lord Kinnear in *Butler* v. *Fife*

Coal Co. Ltd.[8] Their *civil* responsibility has throughout been qualified by the exception that they can escape responsibility by proving—and the burden is on them to prove—that it was not reasonably practicable to prevent the breach, see, on the wording before 1911, *Britannic Merthyr Coal Co. Ltd.* v. *David*[9] and *Marshall* v. *Gotham Co. Ltd.*[10]; and after 1911, section 102 (8) of the Act of 1911.

What, then, is the meaning of these words which have come down to us unaltered for 87 years: "The roof and sides of every "travelling road and working place shall be made secure"?

"Working place" means, I think, every place at which men are working or may be expected to work. It certainly included the area hard by the working face—150 yards long and 2½ yards wide—the stretch along which Mr. Gough was walking at the time of his accident. But what was the "roof" of that working place? and what were the "sides" of it? The "roof" was, I should have thought, the exposed surface over Gough's head as he walked along: and the "sides" were the exposed surfaces on either hand, the working face on his left hand, the packing on his right hand and the rib sides at the far ends before and behind him.

It is clear, I think that, for the purposes of this Act, a working face is a "side." Take the pillar and stall method of getting out coal. The coal is extracted by driving headings and cross-headings leaving blocks of coal to support the roof. These blocks of coal are extracted later. Meanwhile, the sides of these blocks are working faces. Parliament cannot have intended that they should be left insecure. Next take the long-wall method, and consider the position during the day shift whilst the men are moving up the conveyer, and so forth. The working face is all the time a working place. It surely must be made secure for the men doing the work.

This view is supported by the provisions for a pre-shift report. It is the duty of a deputy to make an inspection to see if the place is safe for the men coming on duty in the next shift. This duty is contained in section 61 (1) and (5) of the Act as amended by S.I. 1951, No. 848. The deputy is by that section put under a duty to make a pre-shift report specifying the condition of the "roof and sides." If any proper degree of safety is to be attained, "sides" here must include the working face. And the National Coal Board have recognised this in their printed form on which the deputy is to make his report. It contains this significant instruction:

"CONDITION OF ROOF AND SIDES

"State actual condition of (*a*) working faces and (*b*) roads, "with location of any unsafe place and action taken."

But what does the section mean when it says that these

[8] [1912] A.C. 149, 164–165; 28 T.L.R. 150.

[9] [1910] A.C. 74; 26 T.L.R. 164.

[10] [1954] A.C. 360.

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sides are to be "made secure"? If a coal mine were to be regarded as a permanent structure underground, like the tunnels and stations of an underground railway, then an obligation to "make secure" the roofs and sides would mean make them *permanently* secure, so that they would last indefinitely as a protection against falls of material, always excepting, of course, earthquakes and atom bombs. But a coal mine is not a permanent structure underground. It is always on the move. The working face goes forward. The travelling roads get longer. The obligation to make the roof and sides secure cannot mean permanently secure, but only secure *for the time being*. Take the ripping roof. It is the roof of a working place. It must be made secure for the time being, although it is very soon to be ripped down to extend the travelling road. Consider the working face during the day shift when the men are moving up the conveyor. It is the side of a working place. It must be made secure for that shift at least, even though on the afternoon shift the cutter is going to cut along it.

But now comes the question: Does the obligation to make secure come to an end as soon as men begin to knock down the ripping roof or cut into the working face? Does the obligation cease from the time that the cutter starts at one end of the long-wall of 150 yards? and not arise again until the day shift have filled off all the coal from the cut? I cannot think this is correct. I do not think the obligation to make secure ceases for any length of time at all. Whenever the roof is knocked down or sides are cut into, the portion which remains standing must immediately be made secure. It must be made secure from unintended falls. During the night shift, as soon as the cutter goes along, nogs must be inserted in the cut and the face props reset. During the day shift, as soon as coal is removed, temporary props must be erected to support the roof. And so forth. It may happen, of course, that on occasion more coal comes down than is intended. This is no breach by the mine owners so long as it was not reasonably practicable to avoid it. But save for such exceptions the obligation to render the face secure is a continuing obligation to make it secure, that is, free from danger of unintended falls.

So in this case, when a portion of the face remained standing after the cutter had cut underneath it, it was the obligation of the mine owners to make it secure. If nogs were not sufficient, sprags should not have been put up to buttress the face. Only in that way could men like Gough be protected whilst at their working place.

There remains, however, the question: Was it reasonably practicable for the National Coal Board to avoid the breach? The burden in this respect was on the National Coal Board and they have no finding on it in their favour. I should not be prepared on the transcript to hold they had discharged it.

And I do not myself feel disposed to send the case back for a retrial so as to give them the opportunity of getting a finding on it now. They should have asked the judge to find it at the trial. I would, therefore, allow the appeal and direct that judgment should be entered for £600, the damages assessed by the judge.

Appeal allowed.

Solicitors: *Stafford Clark & Co. for Hooper & Fairbairn, Dudley; Donald H. Haslam for F. W. Dawson, Dudley.*

F. C.

[PRIVY COUNCIL.]

J. C.†
1959
April 7.

BEATRICE ALEXANDRA VICTORIA DAVIES APPELLANT;
AND
PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Charity—Public—Section of community—Religion—Property devised to "Presbyterians the descendants of those settled in the Colony "hailing from or born in the North of Ireland"—In trust to establish "college for the education . . . of their youth" in specified religious standards—Not a valid charitable devise—Beneficiaries a fluctuating body of private individuals—Element of public benefit lacking.
Charity—Religion.
Australia (New South Wales).
Privy Council—Leave to appeal—Special leave—Whether gift falling into possession charitable—40 years after judgment.

A testator, who died on January 21, 1897, by his will made in 1894, gave successive life interests to his widow and certain of his nephews in "Block 70B on which stands Ultimo House" in Sydney, New South Wales, and by a codicil of 1895 gave the property on the termination of the life interests "to the Presbyterians the "descendants of those settled in the Colony hailing from or born "in the North of Ireland to be held in trust for the purpose of "establishing a college for the education and tuition of their youth "in the standards of the Westminster Divines as taught in the "Holy Scriptures." On an originating summons issued in 1918 by the then sole trustee for the determination of certain questions it was held, inter alia, by the trial judge and, on appeal, by the Full Court of the Supreme Court of New South Wales, that the above devise was a good charitable trust for the purposes mentioned in the codicil. The last of the life tenants interested in Block 70B died in 1957, and thereupon—nearly 40 years after the decision of

† *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

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the courts in Australia—special leave was given to the appellant, as representing the next-of-kin, to appeal against the decision of the Full Court of the Supreme Court:—

Held, that, although the object of the testator's bounty was, prima facie, a charitable object within the classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A.C. 531, 583; 7 T.L.R. 657, the qualifications for eligibility for education at the proposed college had the result of making beneficiaries under the trust nothing more than "a fluctuating body of "private individuals," and the gift failed because the necessary element of public benefit was lacking.

Dicta in *Verge* v. *Somerville* [1924] A.C. 496, 499; 40 T.L.R. 279 and *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.* [1951] A.C. 297, 305, 306, 309; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31 applied.

In re Tree [1945] Ch. 325; 61 T.L.R. 383; [1945] 2 All E.R. 65 distinguished.

Judgment of the Supreme Court of New South Wales reversed.

Appeal (No. 26 of 1958), by special leave, from a judgment of the Full Court of the Supreme Court of New South Wales (Pring and Gordon JJ. and Langer Owen Ag.-J.) (June 14, 1919) and the decretal order thereon (September 26, 1919) upholding a decision of Harvey J., a judge of that court sitting in Equity (December 20, 1918).

The following facts are taken from the judgment of the Judicial Committee: The only question arising for decision on this appeal was whether a devise contained in a codicil to the will of George Harris was or was not a valid charitable devise. The parties were in agreement that the devise was invalid unless it could be upheld as being charitable. It was in the following terms: "I give and "devise Block Seventy B upon which stands Ultimo House to "the Presbyterians the descendants of those settled in the Colony "hailing from or born in the North of Ireland to be held in trust "for the purpose of establishing a college for the education and "tuition of their youth in the standards of the Westminster "Divines as taught in the Holy Scriptures."

The testator lived at Ultimo, Sydney, New South Wales, and died on January 21, 1897. By his will dated April 18, 1894, the testator devised Block 70B to his wife for her life, and thereafter to his nephew, John Harris, for life, and thereafter to the next surviving eldest son of his brother John for life until the death of the last survivor of his nephews, the sons of his brother John, and then to his heir-at-law bearing the name of Harris. By the said codicil, which was dated April 3, 1895, the testator revoked the ultimate devise to his heir-at-law and substituted the devise already set out. He also revoked several provisions of his will as to the destination of the ultimate residue of his estate, and gave that residue to the college to be founded pursuant to the said devise, directing that it be "held at interest and this latter added "to the income annually."

The last of the life tenants interested in Block 70B died on April 19, 1957. At that date Block 70B, which had been resumed

by the Government of the State of New South Wales, was represented by investments representing the proceeds of sale thereof worth approximately £53,000, and the value of the residue was £286,750.

On October 26, 1918, one John Harris, who was then the sole trustee of the will, issued an originating summons in the Supreme Court of New South Wales in Equity, for the determination of a number of questions. Question 10 (a) asked whether the devise of Block 70B (and another devise not material for the present purposes) were valid devises. At the hearing of the originating summons by Harvey J., counsel for certain of the defendants (who were among the next-of-kin of the testator), and counsel for the University of Sydney submitted that the devise in question was void for uncertainty and was not charitable as it was confined to a restricted class. Those submissions were replied to by counsel for the Attorney-General. After the Attorney-General's address, the judge made the following note, on December 18, 1918: "Subject to affidavit by Attorney-General as to Presbyterian "children, I answer 10 (a) in affirmative as being a vested "remainder for a good charitable object."

Next day an affidavit was sworn by one William Wood, and it appeared from the judge's further note that that affidavit was put in evidence before him. The deponent stated that he was the financial secretary of the Presbyterian Church of Australia in the State of New South Wales, that he had occupied that position for over 25 years, and that he had an intimate knowledge of the affairs and constitution of the Presbyterian Church in that State. He then deposed to the fact that "amongst the members of the "Presbyterian Church in this State in the year 1897 there were "numerous persons descendants of Presbyterian settlers in this "State, and hailing from or born in the North of Ireland, and "at the present time there are still a considerable number of "adherents or members of the said Church similarly descended." That was the only evidence before the judge as to the existence or otherwise of persons of the class required by that devise, and he was apparently of the opinion that it satisfied the condition which he had imposed when answering question 10 (a) in the affirmative.

In his formal judgment delivered on December 20, 1918, Harvey J. said: "I have already held that the effect of the codicil "is to revoke both devises in the will in favour of the testator's "heir-at-law, but that the life interest in Ultimo House in favour "of his widow and nephews, and the life interest in the residuary "real estate in favour of his nephews are not disturbed by the "codicil. I have also held that the trust for founding a Presbyterian college is a good charitable trust, being an immediately "vested remainder waiting only for the determination of the "antecedent life estates of the sons of John Harris. When this "remainder falls in it will become necessary to settle a scheme "for the administration of this trust."

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That decision was upheld on appeal by the Full Court of the Supreme Court of New South Wales. In delivering the judgment of that court, Langer Owen Ag.-J. said, with reference to the devise now in question: "Harvey J. held that it amounted to a "trust for founding a Presbyterian college, and it is a good charit-"able trust for the purposes mentioned in the codicil, and we "agree with him. We think that it should be construed as a "devise for the benefit of Presbyterians descended from those "settled in New South Wales hailing from or born in the North "of Ireland to be held by trustees for the purpose of establishing "a college for the education of their youth according to certain "religious standards. It is not a devise to or for the Presbyterian "Church of Australia as constituted by the Presbyterian Church "of Australia Act, 1900. It is a devise for the benefit of certain "individuals who are Presbyterians, and who come within a "certain description, and the object is to afford facilities for "religious education. It may be that, when the time arrives for "carrying this charitable trust into effect, it may be found "impracticable to do so. In that event there is nothing in our "decision, and there should be no expression inserted in the "decree, to prevent the beneficiaries under the will and codicil "from contending that the cy-près doctrine is not applicable to "these devises."

The decree of the Full Court, so far as material, stated that the devises of Block 70B (and of another property not material for the present purpose) were valid charitable devises for the respective purposes contained in the codicil, and continued "but this "declaration is without prejudice to the right of the beneficiaries "or any of them under the said will to contend that the cy-près "doctrine is not applicable to these devises or either of them if "the said purposes are incapable of taking effect when the respec-"tive funds become available for the said purposes. The said "devise of Block 70B in the said codicil is subject to the prior "life estates therein given by the said will in favour of the widow "and certain nephews of the testator the sons of his brother "John."

After the death of the last of the life tenants interested in Block 70B, on April 19, 1957, special leave to appeal was granted to the present appellant, as representing the testator's next-of-kin. So it was that this appeal came before their Lordships' Board nearly 40 years after the decision of the courts in Australia.

1959. February 5, 9, 10, 11. *K. S. Jacobs Q.C.* and *D. E. Horton* (both of Australia) for the appellant.

Gordon Wallace Q.C., *Russell W. Fox* (both of Australia) and *J. G. Le Quesne* for the respondent, the Attorney-General for New South Wales.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Laverty* v. *Laverty* [1]; *In re*

[1] [1907] 1 Ir.R. 9.

Hobourn Aero Components Ltd.'s Air Raid Distress Fund[2]; *Inland Revenue Commissioners* v. *Baddeley*[3]; *Attorney-General* v. *Stewart*[4]; *Williams' Trustees* v. *Inland Revenue Commissioners*[5]; *Williams' Trusts* v. *Inland Revenue Commissioners*[6]; *Goodman* v. *Mayor of Saltash*[7]; *Gilmour* v. *Coats*[8]; *Hoare* v. *Hoare*[9]; *In re Cox, Decd., Baker* v. *National Trust Co. Ltd.*[10]; *General Assembly of Free Church of Scotland* v. *Lord Overtoun*[11]; *In re Allen*[12]; *Lang* v. *Purves*[13]; *Purves* v. *Lang*[14]; *MacPherson* v. *Sutherland*[15]; *Dill* v. *Watson*[16]; *Attorney-General* v. *Bunce*[17]; *Attorney-General* v. *Murdoch*[18]; *In re Gott*[19]; *Flint* v. *Warren*[20]; *In re Tacon*[21]; *Clayton* v. *Ramsden*[22]; *In re Wolffe*[23]; *In re Blaiberg*[24]; *Armenian General Benevolent Union* v. *Union Trustee Co. of Australia Ltd.*[25]; *In re Parker, Decd.*[26]; *In re MacDuff*[27]; *In re White*[28]; *Perpetual Trustee Co. (Ltd.)* v. *Ferguson*[29]; *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. (Ltd.)*[30]; *Taylor* v. *Taylor*[31]; *In re Wright, Blizard* v. *Lockhart*[32]; *Fisher* v. *Jackson*[33], and *Attorney-General* v. *Powell.*[34]

April 7. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts set out above and continued: The main contentions of Mr. Jacobs for the appellant were, first, that the element of "public benefit" was lacking in the trust created by the codicil, and secondly, that the gift was void for uncertainty as to the persons for whose benefit the trust was created, the uncertainty arising from the meaning of the words "the Presbyterians," coupled with the words "those" and "their youth."

Their Lordships now turn to considering the construction of the gift in the codicil. It is a gift to a body of trustees described as "the Presbyterians the descendants of those settled "in the Colony hailing from or born in the North of Ireland." For reasons which will later appear, their Lordships will assume,

[2] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.
[3] [1953] Ch. 504; [1953] 2 All E.R. 233; [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.
[4] (1872) L.R. 14 Eq. 17.
[5] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.
[6] [1945] 2 All E.R. 235; 173 L.T. 221.
[7] (1882) 7 App.Cas. 633.
[8] [1949] A.C. 426; 65 T.L.R. 234; [1949] 1 All E.R. 848.
[9] (1886) 56 L.T. 147.
[10] [1955] A.C. 627; [1955] 3 W.L.R. 42; [1955] 2 All E.R. 550.
[11] [1904] A.C. 515; 20 T.L.R. 730.
[12] [1953] Ch. 810; [1953] 3 W.L.R. 637; [1953] 2 All E.R. 898.
[13] (1862) 15 Moo.P.C. 389.
[14] (1856) 2 Legge 955.
[15] (1885) 6 N.S.W.R.Eq. 114.
[16] (1836) 2 Jones' Exch.(Ir.) 48.
[17] (1867) L.R. 6 Eq. 563.
[18] (1849) 7 Hare 445.
[19] [1944] Ch. 193; 60 T.L.R. 214; [1944] 1 All E.R. 293.
[20] (1847) 15 Simons 626.
[21] [1958] Ch. 447; [1958] 2 W.L.R. 66; [1958] 1 All E.R. 163.
[22] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.
[23] [1953] 1 W.L.R. 1211; [1953] 2 All E.R. 697.
[24] [1940] Ch. 385; 56 T.L.R. 487; [1940] 1 All E.R. 632.
[25] (1952) 87 C.L.R. 597.
[26] [1949] V.L.R. 133.
[27] [1896] 2 Ch. 451; 12 T.L.R. 452.
[28] [1893] 2 Ch. 41; 9 T.L.R. 261.
[29] (1951) 51 N.S.W.S.R. 256.
[30] (1940) 63 C.L.R. 209.
[31] (1910) 10 C.L.R. 218.
[32] [1954] Ch. 347; [1954] 2 W.L.R. 972; [1954] 2 All E.R. 98.
[33] [1891] Ch. 96.
[34] (1890) 11 N.S.W.R.Eq. 263.

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without so deciding, that the words "the Presbyterians" in this context can be given a definite meaning. As the codicil speaks from the testator's death it is plain that the class of "Presbyterians" must be ascertained as at January 21, 1897, but it is not every Presbyterian living at that date who is selected as a trustee. A Presbyterian to qualify must be a descendant of Presbyterians—the word "Presbyterians" must clearly be implied after the word "those"—settled in the Colony and either hailing from or born in the North of Ireland. The phrase "hailing from" is not very explicit, but may be taken to refer to persons who were resident in the North of Ireland at the time when they embarked for New South Wales.

The persons to be educated at the college are limited to "their youth"; that is, as their Lordships interpret the words, the children and remoter issue of the persons to whom as trustees the gift is made. Thus, the class of persons eligible to attend the college is defined simply by relationship to one or more of a number of persons living on January 21, 1897. A boy would only be eligible if (i) he was descended from a Presbyterian living at that date, and (ii) that Presbyterian was himself descended from a Presbyterian who had settled in the Colony, and (iii) that settler either hailed from or was born in the North of Ireland.

Curious results follow if it be imagined that the college is founded in 1959, and it has to be ascertained whether particular boys belong to the class of "their youth." Boy "A" is the son of members of a Presbyterian Church, but neither of his parents was living in 1897 and his ancestors then living were not Presbyterians. Boy "B" is the son and grandson of Presbyterians, but his Presbyterian ancestors living in 1897 were not descended from Presbyterian settlers, but themselves adopted Presbyterianism. Boy "C" is a descendant of Presbyterians living in 1897 and these Prebyterians were descended from Presbyterian settlers, but the Presbyterian settlers came from England or Scotland. No one of the three boys in question is within the class of beneficiary defined by the settler. Boy "D's" parents have no religion at all, but he has one grandparent who was living in 1897, was then a Presbyterian, and was descended from Presbyterian settlers who "hailed" from Northern Ireland. He is within the class of beneficiaries.

The law relating to charitable trusts must now be applied to these facts. In the course of his argument on behalf of charity, Mr. Wallace, for the Attorney-General, invited the Board to put a construction on the gift which would amount, in effect, to disregarding the words "the descendants of those settled in the "Colony hailing from or born in the North of Ireland." This is a tempting invitation, but it must be rejected. To follow such a course would be to make a new and, perhaps, a better codicil for the testator, instead of construing his words. It is to these words, as they have already been construed, that the principles laid down by the relevant authorities must now be applied.

It is to be observed at once that the object of the testator's bounty is prima facie a charitable object within the well-known classification in *Commissioners for Special Purposes of Income Tax* v. *Pemsel*,[1] being concerned both with education and with the advancement of a particular religious faith. It is, however, now well established that an element of public benefit must be present even in such gifts, if they are to stand in the privileged position of a charitable gift. This aspect of the law relating to charitable trusts has been more fully discussed and developed by the Board and in the House of Lords since the decision of the Full Court in the present case. Thus, in *Verge* v. *Somerville*,[2] Lord Wrenbury said, in delivering the judgment of the Board: "To ascertain whether a gift constitutes a valid charitable trust "so as to escape being void on the ground of perpetuity, a first "inquiry must be whether it is public—whether it is for the "benefit of the community or of an appreciably important class "of the community. The inhabitants of a parish or town or any "particular class of such inhabitants, may, for instance, be the "objects of such a gift, but private individuals, or a fluctuating "body of private individuals, cannot." In *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[3] Lord Simonds said: "It is a "clearly established principle of the law of charity that a trust is "not charitable unless it is directed to the public benefit. This is "sometimes stated in the proposition that it must benefit the "community or a section of the community . . . With a single "exception, to which I shall refer, this applies to all charities. "We are apt now to classify them by reference to Lord Mac-"naghten's division in *Income Tax Commissioners* v. *Pemsel*,[4] "and as I have elsewhere pointed out, it was at one time "suggested that the element of public benefit was not essential "except for charities falling within the fourth class 'other pur-"'poses beneficial to the community.' This is certainly wrong "except in the anomalous case of trusts for the relief of poverty "with which I must specifically deal. In the case of trusts for "educational purposes the condition of public benefit must be "satisfied. The difficulty lies in determining what is sufficient "to satisfy the test, and there is little to help your Lordships "to solve it." No question of the relief of poverty arises in the present case. Lord Simonds later observed[5]: "A group of "persons may be numerous but, if the nexus between them is "their personal relationship to a single propositus or to several "propositi, they are neither the community nor a section of the "community for charitable purposes," and later he added, "it "must not, I think, be forgotten that charitable institutions enjoy "rare and increasing privileges, and that the claim to come "within that privileged class should be clearly established."

[1] [1891] A.C. 531, 583; 7 T.L.R. 657.
[2] [1924] A.C. 496, 499; 40 T.L.R. 279.
[3] [1951] A.C. 297, 305; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.
[4] [1891] A.C. 531
[5] [1951] A.C. 306.

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Lord Normand said [6]: "No general rule has yet been formulated by which to distinguish trusts which have this essential element of public benefit and those which have not, and the valiant attempts of counsel to arrive at a rule have failed to convince me. I am, however, satisfied that the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. That seems to me to follow from the principle that the trust purpose must be directed to the benefit of the community or a section of the community. (Tudor on Charities, 5th ed., p. 11, approved by Lord Greene M.R. in *In re Compton.*[7]) The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined."

Their Lordships find it unnecessary to refer to any other authorities. The principles thus laid down must be applied to the facts of each particular case, and their Lordships have not found it easy to decide on which side of the line falls the trust which the testator desired to establish. They will assume that the college to be established was intended to provide a general education and not only to give education in the standards of the Westminster Divines. Even so, they are unable to hold that the objects of the trust are either the community or a section of the community. They clearly are not "the community," for the testator has been at pains to impose particular and somewhat capricious qualifications upon the persons who are to benefit from this education. Nor can these persons, in their Lordships' opinion, be "a section of the community" in the sense in which these words have been interpreted in the authorities. The facts which must be proved by any boy who claims to come within the class of beneficiaries have already been stated, and it is clear that the nexus between the beneficiaries is simply "their personal relationship to several propositi," namely, certain persons living at the death of the testator. And these persons are not themselves, in their Lordships' view, a section of the community. They are certain Presbyterians who can establish a particular descent. Moreover, the qualifications which a boy must possess in order to benefit are in some respects wholly irrelevant to the educational object which the testator had in mind. It cannot be said that boys whose Presbyterian ancestors (living on January 21, 1897) trace their descent from emigrants from Northern Ireland are in greater need of education in the standards of the Westminster Divines than other boys whose Presbyterian ancestors (living as aforesaid) are descended from emigrants from, e.g., England or Scotland. In their Lordships' opinion the qualifications laid down by the testator have the result of making beneficiaries under the trust nothing more than "a fluctuating body of private

[6] [1951] A.C. 306, 309.

[7] [1945] Ch. 123, 128; 61 T.L.R. 167; [1945] 1 All E.R. 198.

"individuals," and the gift must fail because the element of public benefit is lacking. This being so, they need not consider further the argument as to uncertainty already mentioned. Counsel for the respondents relied strongly upon the case of *In re Tree*.[8] That case is, however, distinguishable from the present case on the ground that the element of poverty was present, but their Lordships doubt if the decision could have been justified had that element been absent.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed, and it should be declared, in answer to question 10 (a) of the originating summons, that the devise of Block 70B contained in the codicil of April 3, 1895, was not a valid charitable devise.

The costs of all parties to this appeal, as between solicitor and client, must be paid out of the funds representing the proceeds of sale of Block 70B. The order of the Full Court as to the costs of the proceedings before it will not be disturbed.

Solicitors: *Bell, Brodrick & Gray; Light & Fulton.*

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[8] [1945] Ch. 325; 61 T.L.R. 383; [1945] 2 All E.R. 65.

[COURT OF APPEAL.]

HERBERT *v.* HAROLD SHAW LTD.

[1957 H. No. 341.]

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April 9, 10.
Hodson, Romer and Pearce L.JJ.

Factory—Persons benefited by regulations—"Persons employed"—Independent contractor—Self-employed roofer falling off roof—Failure to provide proper equipment—Whether duty owed to independent contractor under building regulations—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60.

Building—Safety regulations—Application—Independent contractor—Whether applicable to self-employed workman—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 31 (1).

"Workman"—Meaning—Employers and Workmen Act, 1875 (38 *&* 39 *Vict. c.* 90), *s.* 10.

The plaintiff, a skilled roofer, was engaged on roofing work on a shed which was being erected by the defendants, a firm of roofing contractors, for the National Coal Board, when he slipped, fell and was injured. The plaintiff was a self-employed workman, who had worked exclusively for the defendants for several years before the accident. He was paid sometimes at an hourly rate, sometimes at a piecework rate. He engaged and paid an assistant himself, but

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[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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charged his assistant's wages to the defendants. For national insurance purposes he paid for his own stamp as a self-employed person and, for tax purposes, he was assessed under Schedule D, as a man running his own business. He brought an action for damages against the defendants, inter alia, for breach of the Building (Safety, Health and Welfare) Regulations, 1948,[1] in that they failed to provide proper equipment:—

Held, that no duty was owed to an independent contractor under the Building (Safety, Health and Welfare) Regulations, 1948, and since the plaintiff was outside the master and servant relationship, his claim under the regulations failed.

Appeal from Streatfeild J., sitting at Nottingham.

On July 19, 1956, the plaintiff, Albert James Herbert, a skilled roofer, was fixing asbestos roofing sheets to the steel framework of a shed, when his foot slipped and he fell over the edge of the roof. The shed was being erected by the defendants, Harold Shaw Ltd., a firm of roofing contractors, for the National Coal Board at Clifton Colliery, near Nottingham.

The plaintiff had been a skilled roofer for many years. Before the war he had been a roofing and tiling contractor on his own account; during the war he was employed by the defendants as a foreman, and after the war he decided that he would be his own master. In the first year after the war he worked occasionally for persons other than the defendants, but for five years before the accident he worked exclusively for the defendants.

The method of payment varied, the plaintiff sometimes being paid at an hourly rate, and sometimes by piecework. He paid and engaged his own assistant himself and charged his assistant's wages to the defendants. On the present job he was paid at the rate of 9s. 1d. per hour, 4s. 1d. being in respect of the wages payable to the assistant. He stamped his own national insurance card as a self-employed person, and for tax purposes he was treated as a man running his own business. An accountant prepared his returns for the purpose of profits under Schedule D. The plaintiff provided no tools other than his own hand tools. The

[1] Factories Act, 1937, s. 60: "(1) Where the Secretary of State "is satisfied that any manufacture, "machinery, plant, [equipment, ap- "pliance] process, or description of "manual labour, used in factories is "of such a nature as to cause risk "of bodily injury to [the persons "employed], or any class of those "persons, he may, subject to the "provisions of this Act, make such "special regulations as appear to him "to be reasonably practicable and to "meet the necessity of the case."

Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145), reg. 4: "It shall be the "duty of every contractor and em- "ployer of workmen who is under- "taking any of the operations to "which these regulations apply . . . "(ii) to comply with such of the "requirements of regulations 31–33, ". . . as relate to any work, act "or operation performed or about to "be performed by such contractor or "employer of workmen; . . ."

Reg. 31: "(1) Where work is done "on the sloping surface of a roof "and, taking into account the pitch, "the nature of the surface, and the "state of the weather, a person em- "ployed is likely to slip down or off "the roof, then unless he has ade- "quate handhold or foothold or is "not liable to fall a distance of more "than 6 feet 6 inches from the edge "of the roof, suitable precautions "shall be taken to prevent his so "falling."

defendants did not supply any equipment, although they had some equipment of their own. The defendants endeavoured to make arrangements with main contractors in their contracts for the supply of safety devices and equipment. On the day of the accident the plaintiff borrowed two ladders, but he could not borrow a plank, which he thought to be necessary to give him a better foothold on the roof.

The plaintiff brought an action against the defendants, claiming damages for the injuries he suffered because of the accident. In his statement of claim he alleged that he was employed by the defendants and relied upon the defendants' negligence at common law and their breach of statutory duty by failing to provide proper equipment as required by the Building (Safety, Health and Welfare) Regulations, 1948.

Streatfeild J. found that there had not been any negligence nor any non-compliance with the Building Regulations of 1948. He further held that, in any event, the plaintiff was an independent contractor to whom no duty was owed in respect of the provision of equipment either at common law or under the Building Regulations of 1948. He therefore dismissed the plaintiff's claim. The plaintiff appealed.

J. R. Bickford Smith for the plaintiff.
Marven Everett Q.C. and *A. E. James* for the defendants.

The following cases were cited in argument: *Lavender* v. *Diamints Ltd.*[2]; *Wingrove* v. *Prestige & Co. Ltd.*[3]; *Mulready* v. *J. H. & W. Bell Ltd.*[4]; *Massey-Harrison-Ferguson (Manufacturing) Ltd.* v. *Piper*[5]; *Davies* v. *Collins*[6]; *Edwards* v. *Newland*[7]; *Stuart* v. *Evans*[8]; *Grainger* v. *Aynsley & Co.*[9]; *Sleeman* v. *Jenks*[10]; *Pillar* v. *Llynvi Coal and Iron Co. Ltd.*[11]; *Squire* v. *Midland Lace Co.*[12]; *Ingram* v. *Barnes.*[13]

HODSON L.J. referred to the facts and continued: Streatfeild J. stated his conclusion as follows: "I do not think that it can be "said on those facts that [the plaintiff] was a person who, being "a craftsman, has entered into, or works under, a contract with "an employer, that being a contract personally to execute any "work or labour. That that was the hope and the expectation I "have no doubt, but that it was the contract I do not think is "proved. For that reason, therefore, I do not think that any "contract of employment, either for service or for services, ever

[2] [1949] 1 K.B. 585; (1949) 65 T.L.R. 163; [1949] 1 All E.R. 532.
[3] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.
[4] [1953] 2 Q.B. 117; [1953] 3 W.L.R. 100; [1953] 2 All E.R. 215.
[5] [1956] 2 Q.B. 396; [1956] 3 W.L.R. 271; [1956] 2 All E.R. 722.
[6] [1945] 1 All E.R. 247; (1945) 61 T.L.R. 218.
[7] [1950] 2 K.B. 534; (1950) 66 T.L.R. (Pt. 2) 321; [1950] 1 All E.R. 1072.
[8] (1883) 49 L.T. 138.
[9] (1886) 6 Q.B.D. 182.
[10] (1864) 33 L.J.Exch. 153.
[11] (1869) L.R. 4 C.P. 752.
[12] [1905] 2 K.B. 448; (1905) 21 T.L.R. 466.
[13] (1857) 7 El. & B. 115.

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"came into existence, quite apart from their hope and expectation, and indeed their practice. I think that at all material times [the plaintiff] was carrying on as he preferred to carry on, namely, as an independent contractor."

Having come to that conclusion of fact, the judge came to the further conclusion that the plaintiff, who was in the habit of working on a roof and making his own arrangements for borrowing ladders and any necessary boards he might require and finding his own tools, was not in a position to say, because he fell off a roof, that the defendants were liable either at common law or under the building regulations for breach of any regulations designed for the safety of workmen.

That conclusion is, I think, quite unassailable, but it has been attacked in this court on the basis that sufficient regard was not had to the definition of "workman" contained in the Employers and Workmen Act, 1875, which was an Act "to enlarge the powers of county courts in respect of disputes between employers and workmen," and contained the following definition in section 10: "The expression 'workman' . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." It is submitted that that definition has application to the present case, and the judge, without ruling upon that, dealt with the case on the footing that that definition might apply. In the passage which I have read, he found the facts, which are justified by the evidence, which would cause this action to fail even if this definition applied. Having regard to the way the case has been dealt with, I think it is our duty to point out that that Act has no direct bearing on the present case at all. The definition is expressed to be a definition of "workman" in this Act, and it was applied expressly in other Acts of Parliament, not only in the Truck Amendment Act, 1887, but also in the Employers' Liability Act, 1880; but it was not applied in the Factories Act, 1937, under which the building regulations in question here were made. The expression "workman" as such, so far as our researches have gone, does not appear at all in the Factories Act, 1937, although it does appear in the building regulations. It does not, therefore, have a direct bearing on this case that, for the purposes of particular legislation, the word "workman" has been defined.

I think the question is a very simple one and does not necessarily depend, for example, on whether this man had to do the work himself. Some contracts with independent contractors have to be performed by the man himself with whom the contract is made. It is immaterial whether the plaintiff was expected to

work on the site himself or whether he could have left his assistant in his place if it was not convenient for him to be there. The contract was essentially not a contract for work, but a contract for the results of the work, which is an expression used in one of the authorities. The fact that he was paid by the hour seems to me not to throw any doubt on the view which I have expressed. He was paid by the hour at the standard rate at the material time, and the defendants allowed him to add in his bill against them the wages which he paid to his assistant. The contract between the plaintiff and the defendants was, however, a perfectly straight-forward contract between independent contractors, and no question of employer and employee or master and servant arises. In that state of affairs, the plaintiff had no possible claim against these defendants for his unfortunate accident, and, to be fair to him, he has never in his evidence blamed the defendants of the casualty which befell him on this day. I think this appeal fails and should be dismissed.

ROMER L.J. I entirely agree, and I only wish to say it is my view also, as my Lord has said himself, that no assistance is to be derived in the present case from the definition of "workman" in section 10 of the Employers and Workmen Act, 1875. I think the question has to be decided as a question of construction of the Factories Act, 1937, and the regulations made under that Act, and the definition in the Act of 1875 is of no assistance in the elucidation of the problem.

PEARCE L.J. I agree. The judge considered carefully the arguments and evidence put forward on behalf of the plaintiff and came to the conclusion that the alleged duty was not owed. In my view, there can be no criticism of the result at which he arrived. He investigated the matter on the hypothesis that the plaintiff was right in arguing that the definition of "workman" in the Employers and Workmen Act, 1875, was applicable, but I do not understand him to have accepted that hypothesis as correct; nor do I think that that hypothesis is correct.

For the reasons which Hodson L.J. has given more fully I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Helder, Roberts & Co. for Fidler & Pepper, Sutton-in-Ashfield, Notts; Hewitt, Woollacott & Chown for Browne Jacobson & Roose, Nottingham.*

[COURT OF APPEAL.]

C. A.

1959
April 13, 14, 15.

Hodson, Romer and Pearce L.JJ.

In re HUNT.

Contempt of Court—Committal order—Litigant in person—Whether privileged from arrest—Civil contempt.

Arrest—Privilege from—Court precincts—Litigant in person—Civil contempt.

On a motion by defendants in an action for committal of the plaintiff for contempt of court in failing to attend an appointment before an examiner of the court, pursuant to R.S.C., Ord. 42, r. 32, the plaintiff defended himself in person and the judge ordered him there and then to be committed, and he was arrested in court and taken to Brixton Prison. He applied for a writ of habeas corpus claiming that he had been wrongfully arrested on the ground, inter alia, that he was privileged from arrest while he was in court to conduct his case in person. The Divisional Court refused the application. On appeal:—

Held, that the only privilege from arrest that existed in the circumstances was a privilege of the court to ensure that justice was done by preventing anyone properly before the court from being arrested, so that the appeal failed.

Cameron v. *Lightfoot* (1778) 2 Wm.Bl. 1190 applied.

In re Freston (1883) 11 Q.B.D. 545 considered.

Decision of the Divisional Court [1959] 2 W.L.R. 95; [1959] 1 All E.R. 73 affirmed.

Appeal from the Divisional Court.

On November 4, 1958, Allied Bakeries Ltd. brought a motion before Wynn-Parry J. to commit Kenneth Douglas Hunt, who had unsuccessfully brought an action against them, to Brixton Prison for contempt of court in failing to attend an appointment before an examiner of the court. Hunt defended the motion in person. The judge, being of the opinion that Hunt had no intention of attending any examination that might be fixed, ordered him then and there to be committed to Brixton Prison. Hunt applied for habeas corpus on the ground (inter alia) that he was privileged from arrest while in court to conduct his case in person. The Divisional Court having rejected his application, he appealed.

The appellant in person.

J. R. Cumming-Bruce for the Governor of Brixton Prison.

Bernard Gillis Q.C. and *W. Denny* for Allied Bakeries Ltd.

The following cases, not referred to in the judgments, were cited in argument: *In re Evans* [1]; *Townend* v. *Townend* [2]; *Hobern* v. *Fowler, Ex parte Hobern* [3]; *Young* v. *Young*.[4]

[1] [1893] 1 Ch. 252.

[2] (1905) 22 T.L.R. 50.

[3] (1892) 62 L.J.Q.B. 49; 9 T.L.R. 6.

[4] (1896) 12 T.L.R. 503.

HODSON L.J. This is an appeal from the Divisional Court presided over by Lord Parker C.J., the other members of the court being Cassels and McNair JJ. The decision was given on December 16, 1958, when they refused an application by Hunt, the appellant, for a writ of habeas corpus. Hunt was committed to prison, having been adjudged to be in contempt of an order of the court, by Wynn-Parry J. on November 4, 1958. He was acting in person and conducted his own case and claimed privilege from arrest as he was in court, but nevertheless he was, in accordance with the ordinary practice in these cases, arrested in court. He has claimed that his arrest was contrary to law and he is entitled to be released. In answer to the writ, the Governor of the prison has relied upon the order of Wynn-Parry J. dated November 4, 1958, and the warrant of committal.

The appellant was not committed to prison, as he at one stage of his argument contended, for non-payment of a debt. He was committed to prison for refusing to obey an order of the court, the order being that he should attend before an examiner. It is true that the attendance before the examiner was in aid of the enforcement of a civil debt; the purpose of the examination was that he might be examined as to his means, but the contempt of court of which he was found guilty was the failure to obey an order. The court was acting in a matter of discipline, and the object of sending the appellant to prison was not only to punish him, but to induce him to take such steps as lay in his power to put the matter right by purging his contempt. He has taken no steps to that end. A number of appointments had previously been made for his examination which he did not attend, and he did that which he was entitled to do; he appealed to the Court of Appeal against the order of Wynn-Parry J. That appeal came before the court presided over by Jenkins L.J., the other members of the court being Romer L.J. and Roxburgh J., and his appeal was dismissed.[1] He, on that appeal, again as he was entitled to do, attacked the order of Wynn-Parry J. He raised a number of points, arguing that the decision was bad on the face of it, that the order was wrongly entitled, that the court had no jurisdiction to make such an order for various reasons, and he also argued that the judge in imposing the penalty had no evidence to support the view which he entertained that the appellant had no intention of complying with the order of the court. The judge had this man before him and heard him address him, and he was able to form an assessment of his attitude. He had the history of the matter before him and the points which had been made. All those matters were ventilated before the Court of Appeal and adjudicated upon.

The appeal having been dismissed, the appellant took another course which was open to him, his liberty having been taken from him. He applied for a writ of habeas corpus to the Queen's

[1] [1959] 1 W.L.R. 50; [1959] 1 All E.R. 37.

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Bench Division. In that court[2] he again took the same points as he had taken before the Court of Appeal, in order to show if he could that his arrest was wrongful on the ground that Wynn-Parry J. was wrong, whether the order was bad on the face of it or whether the judge in the exercise of his jurisdiction had erred. The court, without holding that those matters, having been determined by the Court of Appeal, were res judicata, the point not having been taken by the Governor of the prison or the opposite party in this matter that it was res judicata, listened to that argument and came to the conclusion that nothing had been said to cast any doubt upon the conclusion reached by Wynn-Parry J. or upon the conclusions reached by the members of the Court of Appeal who heard the appeal from Wynn-Parry J. This court has taken the same course. It has also had no objection taken by the Governor of the prison or the opposite party and it has listened to the same arguments which were put forward, first, before the Court of Appeal, secondly, before the Divisional Court, and, thirdly, before this court. For my part I am of the same opinion as the Lord Chief Justice; I see nothing which causes me to doubt in any way the correctness of the decision arrived at either by Wynn-Parry J. or by the Court of Appeal which affirmed his decision. Lord Parker C.J. at the end of his judgment[3] referred to the question of how far in habeas corpus proceedings the court can in any event inquire into how jurisdiction is exercised as opposed to the question of whether there is jurisdiction to arrest. I have nothing to add to what he said, which I read: "It may be that "the true view is, and I think the cases support it, that though "this court always has power to inquire into the legality of the "committal, it will not inquire whether the power has been "properly exercised."

I now leave the matters which have been repeated ad nauseam in various courts to come to the question which was raised for the first time in the proceedings for habeas corpus which in this respect are separate from the judgment of Wynn-Parry J. The appellant claims that he was wrongly arrested because he was arrested in court immediately after the committal order had been made, whereas he claims he was privileged from arrest. He has taken a subsidiary point that even if the arrest in court could be justified, he was arrested too soon in time, because although the committal order had been made, yet he had not then and did not until after the order was made apply for a stay of execution, nor had costs been dealt with. I will deal with that subsidiary point first to get it out of the way. In my judgment the matter had been disposed of when the committal order was made, and the only questions which remained were dealt with, albeit after he had been arrested, when the appellant was still present in court and when he was able to make an application,

[2] [1959] 2 W.L.R. 95; [1959] 1 All E.R. 37.

[3] [1959] 2 W.L.R. 95, 98.

as he did, for a stay and to answer if he could any application made as to costs. No restraint was put upon him to prevent him exercising his freedom in that matter, so there is no substance in that. So far as the facts of the case are concerned, there is no report of what took place before Wynn-Parry J. except a report in The Times newspaper which shows that an application for a stay was made, and it appears from that report that the judge made no answer, but refused sub silentio by directing that the next case be called on, whereas one of the counsel engaged in the case told the court yesterday that the application was refused by the word "No." To my mind it makes no difference which way it went. The application was made and dealt with, so there is no substance in the point that the arrest was in point of time too soon.

There remains the question whether or not this man, as a suitor in these courts, was protected from arrest. The privilege which is claimed by him is a privilege which attaches to suitors and to jurors, witnesses and advocates, and as the appellant, who has conducted his case with a high degree of intelligence and pertinacity, has submitted, is a privilege which extends to persons, if it exists at all, not only while they are in these precincts but also while they are coming to this court or going home after they have left the court. If the appellant were right in saying that he, as a person found guilty of contempt for disobedience of an order, cannot be arrested promptly by the court itself, it would produce an absurd situation, for indeed the court would be powerless to carry out its orders or to see that its orders were carried out until, pesumably, the appellant had reached his home, wherever that home might be. It would be a kind of chase which would only start perhaps at Land's End or wherever the home of the litigant in a given case might be. That shows, I think, the absurdity of the proposition and its inherent improbability.

When one examines the position as to privilege from arrest, one finds it is pefectly clear. It was stated by De Grey C.J. in *Cameron* v. *Lightfoot*.[4] That was a case in which the privilege, which, of course, is a privilege of the court and not a privilege of the person at all, was in question because the plaintiff in a former cause endeavoured to arrest a litigant in another cause while he was dining at a tavern on his return from attending the Court of Common Pleas, and the question under discussion was whether that arrest was timely or not. The court put the matter very plainly in this way: "In the present case there is "no irregularity in the process itself, but only in the time of "executing it. The question, therefore, is whether the privilege "of the King's Court, extended to suitors redeundo, so vitiates "an arrest, or suspends the operation of the writ, that the taking "a man thereon, becomes an act of trespass to the party taken. "The ancient way of availing oneself of the privilege of the

[4] (1778) 2 Wm.Bl. 1190, 1192.

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"courts was by suing out a writ of privilege. But this privilege "is not considered as the privilege of the person attending the "court, but of the court which he attends. And therefore the "allowing or not allowing the privilege is discretionary; and it "hath been disallowed in collusive actions and in vexatious "ones."

That, I think, is really sufficient to dispose of the point which the appellant has made that he is entitled to protect himself from the very court which is acting against him. The proposition is, as I say, absurd and is supported by no authority whatsoever. The case has been dealt with, and I have dealt with it, on the basis that this is a class of ordinary contempt, which, although punishable as an offence and not a matter of mere technicality, would if the shelter of privilege were available enable this litigant to come within it. The appellant, as he undoubtedly was entitled to, invited the court so to hold, relying on the observations of Lord Redesdale L.C. in *McWilliams'* case,[5] which are cited in *In re Freston*[6] by Sir William Brett M.R. Lord Redesdale said: "There can be no doubt that the thing to be con-"sidered is, not the form of the process but the cause of issuing "it; if the ground of the proceeding be a debt, it is a process "of debt; if the ground be a contempt, as for instance, dis-"obedience of some order of the court, where the object was not "to recover a debt by means of the process, the consequences "of such a process are in some degree of a criminal nature." The appellant insists that whether this order was an order in respect of a debt or not, the object of it was to recover a debt by means of his examination before an examiner. I would also draw attention to the observations of the other members of the court who drew attention to the fact that disobedience to an order of the court are of various kinds and are often wilful. Lindley L.J. referred[7] to the fact that "some contempts are "merely theoretical, but others are wilful, such as disobedience "to injunctions or to orders to deliver up documents—in these "cases there is no privilege from arrest." Fry L.J. pointed out[8] that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist, and he went on to say: "Further, if the attachment were mere process, "Freston could obtain his discharge ex debito justitiae on show-"ing that he had performed what was required by the master's "order; I do not think that he could have done so in the present "case." That was a case of a solicitor, and he was sent to prison, in the view of the Master of the Rolls, at any rate, because as an officer of the court he had disobeyed an order, and his particular offence was that as an officer of the court he had special duties to perform. The fact remains that in this case the appellant is not in a position to say he can obtain his release from prison as of right by payment of the debt. He

[5] (1803) 1 Sch. & Lef. 169, 174.
[6] (1883) 11 Q.B.D. 545, 553.
[7] Ibid. 556.
[8] Ibid. 557.

has disobeyed an order, and although it is open to him to come to the court at any time and express his willingness to put the matter right so far as he can and seek to obtain his release, yet he is not in a position to say he is entitled to his release as of right, nor is he in a position to say that this exercise of the court's power was not disciplinary and not of a punitive character. It was.

There remains only one point with which I think I need deal, and that is this. The appellant again, rightly I think, contends that where there is any doubt as to whether the liberty of the subject has been infringed, he should be released, and he prays in aid, as he says, doubts which were expressed in the course of argument before the Divisional Court and doubts which he says were expressed in the judgment of Jenkins L.J. There is no trace of any doubt expressed in the judgment of the Divisional Court, although it is said that something was said in argument which gave rise to the view that the Lord Chief Justice entertained some doubt on some point or other. Further, with regard to Jenkins L.J., it is said that one passage of his judgment shows that he had some doubt. The appellant says: "That is enough for me; I must be released." That I think shows a wrong appreciation on his part as to what is meant by the word "doubt." There was no doubt expressed in either of the judgments as far as I can see. The judgments were expressed with clarity and certainty. The fact that in arriving at their conclusions conscientious people may have difficulty or take up time in arriving at their conclusion does not in any sense of the word involve to my mind that there was any doubt in the sense in which the appellant uses the word. I would only add that so far as the illustration of the judgment of Jenkins L.J. is concerned, there is nothing in that. The point of difficulty which occurred to him arose on the construction of the rule which provides that a judge or officer of the court should appoint a day for the examination. The appellant in his researches discovered that an officer of the court could not practise as a barrister, and he also discovered that the lady who was appointed examiner was a barrister, and he argued from that that the order was bad. Of course, that does not assist him at all. The only difficulty which arises on the form of the rule is whether the unfortunate lady appointed as the examiner has for ever after disqualified herself from acting as a barrister; it does not affect the validity of the order which the appellant has criticised.

For these reasons I would dismiss this appeal.

ROMER L.J. I agree. On the question to which my Lord has just referred, the point put forward by the appellant that he should be allowed to avail himself of any doubt arising in this case, I would like to say categorically that I entertain no doubt whatever either as to the legality of the committal order or as to the legality of the arrest.

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On the question which was argued before the Divisional Court and which was argued before us, and which was not, as I do not think it could have been, argued before this court when it heard the appellant's appeal last November, as to his privilege from arrest in the court, we have not heard full argument on the question as to whether the privilege applies to an order such as that with which we are concerned, and it is not necessary to express a concluded opinion upon the question as to whether that privilege does exist or whether it does not. It is quite clear from the judgments of Lindley and Fry L.JJ. in *In re Freston*,[9] to which my Lord has referred, if they accurately represent the law, that the privilege from arrest would not attach in this case. The committal order was quite plainly disciplinary in its effect, and, further, on the judgment of Fry L.J., the appellant could not as of right obtain his release by performing his obligations under the order. In fact he could not perform his precise obligations under the order because the time has gone by, but, at all events, on the principle to which Fry L.J. referred, the appellant would not be entitled to claim privilege from arrest on which he relied. It is not necessary to express a decided view about it, for the reason that, assuming that this privilege does exist, it is quite clear from the authorities to which the Divisional Court referred, and, in particular, *Cameron* v. *Lightfoot*,[10] to which my Lord has referred, that the privilege, if any, is not the privilege of the litigant, but the privilege of the court, and if it be the privilege of the court, nothing could be plainer than that it is open to the court itself to have a man arrested if it thinks proper to do so under a committal order, even though he be in that court.

With regard to the other matters on which Mr. Hunt has relied before us, I think it is true to say that every one of them was mentioned either directly or indirectly—although one or two may not have been argued specifically—before this court when the appeal was heard last November, and whether or not the decision of the court on that appeal renders the matter res judicata, which it is not necessary to decide, there is no reason at all to depart now from the conclusions which this court entertained and expressed on that occasion.

Finally, I only want to make one point clear beyond all shadow of doubt. The appellant, both yesterday and the day before yesterday, made observations more than once from which anybody who heard them and was unacquainted with the history of this case might assume that he is in prison for life for non-payment of a debt. Neither limb of that proposition is true. He has not been committed for not paying a debt, but for wilful disobedience of an order of the High Court. As to the suggestion that he is imprisoned for life, I would desire to say that he could pave the way towards securing his freedom at any time by giving

[9] 11 Q.B.D. 545.

[10] 2 Wm.Bl. 1190.

an assurance to the judge who made the order for his committal that he will now, though belatedly, obey the order which so far he has refused to obey and carrying that assurance into effect.

I agree that the appeal fails.

PEARCE L.J. I agree. The appellant has put forward many points with great ingenuity, but none of them throws any doubt on the validity of the committal order. These arguments have already been considered and rejected by this court on the appeal from the committal order. It may be debatable whether that judgment prevents their being raised de novo, but, at the least, it must carry great weight with us. I, too, agree with the view on this point expressed by the Lord Chief Justice. Even on the hypothesis that the whole matter can be considered de novo, I agree entirely with the views that were expressed by this court on the hearing of the former appeal.

The appellant relies, however, on the further ground, which was not before this court on the former appeal, namely, that his arrest was wrongful. He claims a privilege from arrest as the personal prerogative of the litigant or witness, but I am satisfied that that privilege is the privilege of the court and did not prevent the court from properly ordering the appellant's arrest. It would, indeed, be strange if the court were powerless to enforce its committal order while the litigant was in its precincts, and if it had to wait until he had returned home before arresting him. I see nothing in the cases to justify such a proposition.

The appellant's argument has proceeded on the hypothesis that he was at the material time in the class of persons to whom the court accords the privilege of freedom from arrest. But the words of two of the judgments in *In re Freston*,[11] to which my Lord has already referred, throw some doubt on that hypothesis. Wynn-Parry J. found that the appellant was guilty of wilful disobedience to the order of the court. The committal was a punishment for that disobedience and not merely, as the appellant asserts, an inducement to him to comply with the order, and he could not by complying with the order claim to be released at once ex debito justitiae. It is, therefore, at least arguable that the appellant was not at the time of the arrest in the class of persons to whom the court extends its privilege of freedom from arrest, but it is unnecessary to decide that point.

For those reasons, and the reasons which have been given more fully by my Lords, I agree that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Treasury Solicitor; A. Kramer & Co.*

F. R. D.

[11] 11 Q.B.D. 545.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1959
March 23.

Lord Parker C.J., Streatfeild and Hinchcliffe JJ.

REGINA *v.* OAKES.

Statute — Construction — Absurdity — Avoiding unintelligible result — Jurisdiction of court to amend Act by reading "or" for "and" — Meaning of "or" and "and" — Construction of criminal Act against subject — Official Secrets Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 75), *s.* 7.

By section 7 of the Official Secrets Act, 1920: "Any person "who . . . aids or abets and does any act preparatory to the com- "mission of an offence under the principal Act or this Act, shall "be guilty of a felony . . ."

The appellant was charged with doing an act preparatory to the commission of an offence against section 1 (1) (*c*) of the Official Secrets Act, 1911, contrary to section 7 of the Official Secrets Act, 1920.[1] His contention that section 7 disclosed no offence known to the law was overruled and he then pleaded Guilty and was sentenced to two years' imprisonment. He appealed:—

Held, that although, where the literal meaning of a penal statute produced an intelligible result, there was no ground for reading in words, or changing words, according to what might be the supposed intention of Parliament; in the present case, because of the use of the word "and" after the word "abets" in section 7, no intelligible meaning could be given to the section, but it being clear what the intention was, and there having been merely a faultiness of expression, the court would read "or" for "and" and dismiss the appeal.

Dicta in *Attorney-General* v. *Beauchamp* [1920] 1 K.B. 650, 655, 657, 658 applied.

APPEAL against conviction.

On November 20, 1958, the appellant, Robert Nelson Embleton Oakes, was charged at Kingston-on-Thames Assizes on an indictment containing four counts. The first count charged him with stealing official documents to which he pleaded Not Guilty and was acquitted. The second and third counts charged him with retaining a document and communicating a document contrary to section 2 (1) (*b*) and (*a*) respectively of the Official Secrets Act, 1911, to both of which he pleaded Guilty.

By the fourth count he was charged: "That you, on July 4, "1958, in this county, did an act preparatory to communicating "to another person, for a purpose prejudicial to the safety or

[1] Official Secrets Act, 1920, s. 7: "Any person who attempts to commit "any offence under the principal Act "or this Act, or solicits or incites or "endeavours to persuade another per- "son to commit an offence, or aids or "abets and does any act preparatory "to the commission of an offence "under the principal Act or this Act, "shall be guilty of a felony or a "misdemeanour or a summary "offence according as the offence in "question is a felony, a misdemean- "our or a summary offence, . . ."

"interests of the State, documents calculated to be of use to an "enemy by entering into an arrangement with one Warner where-"by the said Warner was to secure a purchaser for certain docu-"ments used in a prohibited place and in the posession of you, "the said Oakes."

Before the appellant pleaded to the fourth count his counsel moved to quash the count on the ground that it disclosed no offence known to the law. Slade J., after hearing argument, overruled that submission, whereupon the appellant pleaded Guilty to this count and was sentenced to 18 months', 12 months' and two years' imprisonment on the second, third and fourth counts respectively, the sentences to run concurrently.

He appealed against his conviction on the fourth count on the ground that Slade J. misdirected himself on the true construction of section 7 of the Official Secrets Act, 1920.

Gerald Howard Q.C. and *J. S. R. Abdela* for the appellant.

Sir Reginald Manningham-Buller Q.C., A.-G., Harold Brown Q.C. and *E. J. P. Cussen* for the Crown.

The following cases were referred to in argument, in addition to those cited in the judgment of the court: *Gluchowska* v. *Tottenham Borough Council*[2]; *London County Council* v. *Aylesbury Dairy Co. Ltd.*[3]; *Attorney-General* v. *Prince Ernest Augustus of Hanover*[4]; *Mersey Docks and Harbour Board* v. *Henderson Brothers*[5]; *Walker* v. *York Corporation*[6]; *Golden Horseshoe Estates Co. Ltd.* v. *The Crown*[7]; *Rex* v. *Chapman*[8]; *Murdoch* v. *British Israel Federation*[9]; *Rex* v. *Cracknell.*[10]

LORD PARKER C.J., giving the judgment of the court, stated the facts, read section 7 of the Official Secrets Act, 1920, and continued: It is pointed out, as it was pointed out to the judge, that a number of matters are set out in section 7 which will constitute an offence. They are all separated by the disjunctive "or" until one gets to the word "abets," when instead of the sentence going on "or does any act preparatory to the commission "of an offence," the word is "and does any act." Accordingly, it is said that on its literal meaning there is not constituted under that section an offence of doing an act preparatory to the commission of an offence alone, and that being what the appellant was charged with, there is no offence alleged under the section.

The argument here is in a very short compass. Mr. Howard points out what is undoubtedly true, that the concern of the courts

[2] [1954] 1 Q.B. 439; [1954] 2 W.L.R. 302; [1954] 1 All E.R. 408.
[3] [1898] 1 Q.B. 106.
[4] [1957] A.C. 436; [1957] 2 W.L.R. 1; [1957] 1 All E.R. 49.
[5] (1888) 13 App.Cas. 595.
[6] [1906] 1 K.B. 724.
[7] [1911] A.C. 480.
[8] [1931] 2 K.B. 606.
[9] [1942] N.Z. 600.
[10] [1931] D.L.R. 657.

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is to ascertain the intention of Parliament. That intention, certainly in the first instance at any rate, is to be found from the actual words used, and he quotes in support of that some very strong observations of Lord Simonds in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*.[1] Mr. Howard goes further; he says that when you are looking at a penal statute, still more so when you are looking at a penal statute constituting a new offence, it is imperative on the court to look alone at the words used, and in that connection he refers to the judgment of Pollock C.B. in *Attorney-General* v. *Sillem*.[2] There Pollock C.B. said: "We have had in this country no court of criminal equity "since the Star Chamber was abolished, as Lord Campbell called "it, in a case tried before him . . . Blackstone J. well lays down "the rule: 'The freedom of our constitution will not permit that "'in criminal cases a power should be lodged in any judge to "'construe the law otherwise than according to the letter.'" A little further on in the next column he said: "If I were asked "whether there be any difference left between a criminal statute "and any other statute not creating an offence I should say that "in a criminal statute you must be quite sure that the offence "charged is within the letter of the law." Mr. Howard also refers to *Coe* v. *Lawrence*.[3] From there he goes on to contend that if you read the sentence in section 7 literally it, in fact, makes a grammatical sentence, you can give to each word a meaning, and accordingly, he says that, even if the result may be absurd, there is no ground for making any alteration in the language or reading any words into it.

The court feels that it is at that point that it is constrained to depart from Mr. Howard's argument. It seems to this court that where the literal reading of a statute and a penal statute produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament. But here we venture to think that the result is unintelligible. Lord Coleridge in *Attorney-General* v. *Beauchamp*[4] put it quite shortly in these words: "Unquestionably, when one is construing a penal statute, the "first thing is to construe it according to the ordinary rules of "grammar, and if a construction which satisfies those rules makes "the enactment intelligible, and especially if it carries out the "obvious intention of the legislature as gathered from a general "perusal of the whole statute, that grammatical construction "ought not to be departed from." We think that the literal construction here produces an unintelligible result, and for many reasons. In the first place, there is an obvious difficulty as to what is qualified by the words "and does any act preparatory to

[1] [1952] A.C. 189, 190; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.
[2] (1864) 33 L.J.Ex. 92, 110.
[3] (1853) 22 L.J.Q.B. 140.
[4] [1920] 1 K.B. 650, 655.

"the commission of an offence." Does it qualify all the alternatives that have gone before? Does it qualify only the words that have followed the last comma, namely, "or aids and abets," or does it qualify only the last word "abets"? If it qualifies all that has gone before, clearly in regard to an attempt it makes nonsense, because an act preparatory to the offence is something more remote than an act which constitutes an attempt, and, accordingly, it is meaningless in connection with attempts, and indeed it is difficult to give it a meaning with regard to solicits, incites or endeavours to persuade. If, on the other hand, it only qualifies the words "and aids or abets" or the word "abets" alone, then immediately one asks: What is the sense of it applying to those words and not to the words "solicits or incites or "endeavours to persuade." Whichever way it is read, an absurd result is obtained. Secondly, it is to be observed that, but for these words, an aider or abettor by reason of the Accessories and Abettors Act, 1861, would have committed an offence, and accordingly, if the argument is right and the literal interpretation is given it results in this, that in a matter which involves the security of the State the offence of aiding and abetting is limited to such aiding and abetting in which an act preparatory to the commission of an offence has taken place. Thirdly, it is to be observed that the conception of doing an act preparatory to the commission of an offence had been considered by the courts before the passing of the Act of 1920. As long ago as 1855 in *Reg.* v. *Eagleton*,[5] Parke B. was considering the sort of acts which would constitute an attempt, and drawing a distinction between those acts and acts which were more remote and which were merely acts of preparation. Again, in *Rex* v. *Linneker*,[6] the court was drawing a distinction between acts of preparation and acts which would constitute attempts. Also in *Rex* v. *Robinson*[7] the same distinction was drawn. Then, before *Rex* v. *Robinson*[7] in the regulations made in the First World War, the Defence of the Realm (Consolidation) Regulations, 1914, it was provided by an amendment in regulation 48: "Any person who attempts to "commit, or procures aids or abets, or does any act preparatory "to, the commission of, any act prohibited by these regulations, "or harbours any person whom he knows, or has reasonable "grounds for supposing, to have acted in contravention of these "regulations, shall be guilty of an offence against these regula-"tions." Passing for a moment to the period after the passing of the Act of 1920, it is to be observed that by regulation 28 of the Emergency Regulations, 1921, it was again provided that "Any "person who does any act preparatory to the commission of any "act prohibited by these regulations shall be guilty of an offence." The same words appear in the Defence (General) Regulations, 1939, reg. 90 (1), in force during the last war. Everywhere, be it

[5] (1855) Dears. 376, 515.
[6] [1906] 2 K.B. 99.
[7] [1915] 2 K.B. 342.

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observed, when this sort of situation is being discussed and where enactments are made in regard to it, it is considering the doer of an act preparatory to the commission by him of an offence, and it seems to the court that that is the natural meaning of those words. If you try and read those words in that sense as a qualification of aiding and abetting, the result becomes absurd, because the essence of aiding and abetting is the aiding and abetting of someone else to commit an offence, and to say it is a qualification of that that a man should do an act preparatory to the commission of an offence by himself is pure nonsense.

Accordingly, for all those reasons it seems to this court that, read literally, no intelligible meaning can be given to this section, and accordingly, this court agrees with Slade J. The judge thought that the natural way of getting over the difficulty was to read into the Act after the word "and" and before the word "does" the opening words of the section, "Any person who," so that it would read, "or aids or abets and any person who does "any act preparatory to the commission of an offence under the "principal Act or this Act." The court, on the whole, prefers to read the word "or" for "and," because if the words "any "person who" are inserted it leaves the words "aids or abets" in the air, whereas if "and" is changed to "or" it will read in this way: "or aids or abets or does any act preparatory to," and then I insert a comma "the commission of an offence." Indeed, read in that way it happens very closely to correspond with the only two enactments near the time, namely, the regulations of 1914 and of 1921.

Mr. Howard has quite rightly pointed out that, although the court has on occasions read "and" for "or" and "or" for "and," it has with one exception been in order to produce a result more favourable to the subject. The court feels, however, that on principle there is no reason, if compelled to that end, why the words should not be changed even though the result is less favourable to the subject, and, indeed, that was done in *Attorney-General* v. *Beauchamp*.[8] In that case Rowlatt J., having referred to the manifest absurdity which would arise if a literal construction was given, said[9]: "It is not really a question of adding any-"thing to the section, for it is quite clear what the intention was "and the omission of certain words that you would expect to find "there is nothing more than a faultiness of expression." It seems to the court that it is quite clear in the present case what the intention was, and that there has been merely a faultiness of expression. Again, McCardie J., who agreed with Rowlatt J., said at the end of his judgment[10]: "That seems to be the reason-"ably plain meaning of the section which we have to consider, "while it is in agreement with the earlier legislation on the "subject." Everything that was said by those two judges seems

[8] [1920] 1 K.B. 650.
[9] Ibid. 657.
[10] Ibid. 658.

to this court to apply fully in the circumstances of this case. Accordingly, the court will read "or" for "and," and this appeal is dismissed.

Appeal dismissed.

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Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. D. P. (A. H. B.)

[QUEEN'S BENCH DIVISION.]

ROSS *v.* EVANS.

1959
April 17.
Lord Parker C.J., Donovan and Salmon JJ.

Animal—Dog—Unmuzzled and ferocious—Greyhounds being exercised on highway on leads—Whether "at large"—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54 (2).

The defendant was charged with two offences under section 54 (2) of the Metropolitan Police Act, 1839,[1] by suffering an unmuzzled ferocious dog to be at large in a public thoroughfare on two occasions. The justices found that the defendant on the occasions in question was exercising a number of greyhounds in a public street. The dogs were on leads but on each occasion one of them, which the defendant made no effort to control, jumped up and bit a passer-by. They held that on each occasion the offending dog, although on a lead, was "at large" within the meaning of section 54 (2) and, accordingly, found both offences proved. On appeal against conviction:—

Held, that section 54 (2) was aimed at the case where the person in charge of a dog had no physical control over it at all, and no offence was commited under the section where the person in charge had the physical means of controlling the dog, such as a lead, but failed to do so. The offending dog was not "at large" on either occasion within the meaning of section 54 (2), and the appeal must be allowed.

Semble, there may be a case where a dog is on a lead so long that the control over it is so minimal that it is to all intents and purposes a dog "at large."

CASE STATED by Gore (Middlesex) justices, sitting at Harrow.

On June 20, 1958, two informations were preferred by the prosecutor, police constable Alun Evans, against the defendant, Victor Ross, alleging (1) that on February 16, 1958, at Chapel Hill, Harrow Weald, Middlesex, and (2) on March 14, 1958, at

[1] Metropolitan Police Act, 1839, s. 54: "Every person shall be liable "to a penalty not more than 40s., "who, within the limits of the metro-"politan police district, shall, in any "thoroughfare or public place, com-"mit any of the following offences; ". . . (2) Every person who shall "turn loose any horse or cattle, or "suffer to be at large any unmuzzled "ferocious dog, or set on or urge any "dog or other animal to attack, "worry, or put in fear any person, "horse, or other animal: . . ."

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Brookshill, Harrow Weald, he suffered to be at large an unmuzzled, ferocious dog, in each case contrary to section 54 (2) of the Meropolitan Police Act, 1839.

The justices heard the informations on November 4, 1958, and found the following facts: On February 16, 1958, the defendant was walking in Chapel Hill, Harrow Weald, with six or seven greyhounds on a master lead with small leads from it. One of the greyhounds sprang up on one Ronald Thomas Mortimer who was also walking in Chapel Hill, made a small bite on his left arm and tore his coat. On March 14, 1958, the defendant was walking in Brookshill, Harrow Weald, with five or six greyhounds. They were all on leads. He did not try to control a dog, which leapt up and bit one May Mahoney, who was also walking in Brookshill, on her left arm, tearing her coat and causing a wound necessitating hospital treatment including a skin grafting operation and leaving a scar.

It was contended by the defendant that there was no case to answer.

It was contended by the prosecutor that the offences had been proved.

The justices were of the opinion that a dog being on a lead and in the circumstances proved was a dog "at large" within the meaning of section 54 (2). They accordingly found the defendant guilty on both summonses and imposed a fine of 40s. on each, ordering the defendant to pay £33 14s. for costs on the first summons. The defendant appealed.

Stephen Stewart for the defendant.

H. Pownall for the prosecutor.

Lord Parker C.J. This is an appeal by way of case stated by justices for the petty sessional division of Gore, sitting at Harrow magistrates' court, before whom the defendant was charged with two offences contrary to section 54 (2) of the Metropolitan Police Act, 1839, in that he suffered to be at large an unmuzzled ferocious dog. The justices found the offences proved and imposed a fine of 40s. on each summons and ordered the defendant to pay costs. [His Lordship stated the facts and continued:] The sole question, a short one and a novel one, is whether in each of these cases the dog concerned was at large within the meaning of the Act. The Act concerned, the Metropolitan Police Act, 1839, is "An Act for further improving the "police in and near the Metropolis," and by section 54 there are set out a number of acts which are described as "prohibition "of nuisances by persons in the thoroughfares." Subsection (2) provides: "Every person who shall turn loose any horse or cattle, "or suffer to be at large any unmuzzled ferocious dog, or set on "or urge any dog or other animal to attack, worry, or put in "fear any person, horse, or other animal," shall be liable to a penalty.

The justices in this case clearly, I think, came to the conclusion that although a person might have control of a dog by some physical means such as a lead, yet if he did not control the dog, the dog was at large. They say, with regard it is true to only one of the offences charged, but I understand the facts were the same in each case, that the dogs were all on leads, and "the defendant did not try to control the dog," that is, the dog that jumped up and bit the passer-by. For my part I am quite satisfied that an offence is not committed under the section where a person has the physical means of controlling the dog but does not do so. I think that the section is aimed at the case where a person has no physical control of the dog at all. The case was put in argument of a person who had a dog on a lead so long that he could not exercise any physical control. That is certainly not this case, and it may well be that in such a case it could be said that the control was so minimal that the dog was to all intents and purposes a dog at large. However, that is not this case. This is a case where a man could exercise control over the dog by means of the lead but did not do so. In my judgment, the justices were wrong in convicting the defendant on these two charges, and the appeal must be allowed.

Donovan J. I should be glad, if I could, to take the same view as the justices did of the meaning of the expression "suffer "to be at large any unmuzzled ferocious dog" where it occurs in section 54 (2) of the Metropolitan Police Act, 1839. One has little sympathy with anyone exercising six or seven greyhounds on the public highway controlled only by a lead of such a design that the dog cannot, it seems, be effectively prevented from biting passers-by. But the question here is purely one of construction of the section. The prosecutor relies upon the expression "turn loose any horse or cattle" in the same subsection as contrasted with the words "suffer to be at large" used in relation to a dog, and he says that this shows that the legislature contemplated that a dog could be at large although not turned loose. The expression "to turn loose," however, is one commonly used to describe horses or cattle which are set free; but where dogs are concerned the same idea is commonly expressed by the term "suffer to be at large." Of more weight, I think, is the inference to be drawn from section 54 (4) which reads: "Every person having the care of any cart or carriage who "shall ride on any part thereof, on the shafts, or on any horse "or other animal drawing the same, without having and holding "the reins, or who shall be at such a distance from such cart "or carriage as not to have the complete control over every "horse or other animal drawing the same." If the legislature intended section 54 (2) to apply to a dog on a lead giving less than complete control over it, I think similar language would have been used. My Lord has said that it may be that if a

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dog were on a lead which was so extravagantly long that it was for practical purposes just as free to be a nuisance on the highway as if it were loose, it could be said to be "at large" within the meaning of the subsection. There is no evidence of that here. All that the court knows is that in the first episode there was a master lead with small leads from it, and in the second that all the dogs were on leads and the defendant did not try to control the offending dog. That implies that he could have controlled it and that the lead was of such a kind that would have enabled him to do so. Accordingly, when the prosecutor urges that this is a question of fact, I think the answer must be that there was no evidence to justify the conclusion that the leads were so extravagantly long or so hopelessly inadequate as to leave the dog for the purposes of being a nuisance practically at large. That being the case, I do not feel it possible to say that a dog on a lead or leads such as are described in the case is "at large" within the meaning of section 54 (2), and I agree, therefore, that the appeal must be allowed. I hope there is some byelaw which can be invoked in this district to stop a repetition of these incidents.

Salmon J. I agree.

Appeal allowed.

Solicitors: *Darracotts; Solicitor, Metropolitan Police.*

E. M. W.

[COURT OF APPEAL.]

C. A.

1959
April 7, 8.

Sellers and Willmer L.JJ.

MATTHEWS *v.* KUWAIT BECHTEL CORPORATION.

[1958 M. 1835.]

Master and Servant—Contract of service—Implied term—Injury to servant—Damages claimed—Writ alleging breach of contract—Duty impliedly owed by master to servant.

Practice and Procedure—Writ—Service out of jurisdiction—Contract or tort—Action by servant against master for personal injuries—R.S.C., Ord. 11, *r.* 1 (*e*).

Contract—Tort or breach of contract.

Judicial Precedent—Decision long ignored—Limbo of lost causes—Whether servant can sue master for negligence in contract.

The plaintiff, while working as a foreman millwright for the defendants in Kuwait under a service agreement made in England and to be "construed and have effect in all respects in accordance "with the law of England," suffered personal injury by falling into a trench. He started proceedings in England, claiming damages

from the defendants and alleging that they were in breach of the contract of service.

The defendants having no residence in England but an office in Panama, the plaintiff obtained leave to serve the writ out of the jurisdiction, under R.S.C., Ord. 11, r. 1 (*e*),[1] and the writ was served in Panama.

The defendants appealed, contending that the plaintiff's cause of action was in tort and not in contract, and therefore Ord. 11, r. 1 (*e*) had no application and the service of the writ out of the jurisdiction should be set aside:—

Held, that the common law placed an employer under a duty to take all reasonable care for the safety of his servants in the course of their work; that the plaintiff, having suffered injury owing to the defendants' alleged breach of such duty, was entitled to claim damages either in tort or for breach of contract; and that, having elected to sue in contract he was entitled under Ord. 11, r. 1 (*e*)[1] to serve his writ out of the jurisdiction, the rules under Ord. 11 having to be read disjunctively, each subsection being complete in itself and independent of the others.

Tassell v. *Hallen* [1892] 1 Q.B. 321; *Davie* v. *New Merton Board Mills Ltd.* [1959] 2 W.L.R. 331; *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555; [1957] 2 W.L.R. 158, and dictum of Lord Wright in *Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. 57, 81 applied.

Riley v. *Baxendale* (1861) 6 H. & N. 445 not followed.

APPEAL from order of McNair J. in chambers.

On or about April 30, 1957, the plaintiff, John Matthews, entered into a contract in writing with the defendants, Kuwait Bechtel Corporation, through their agents, George Wimpey & Co. Ltd., to go into the service of the defendants as a foreman millwright in Kuwait, or such other location in the Near or Middle East as the company might desire. The plaintiff went out to Kuwait, and on May 28, 1957, met with an accident by falling into a trench when engaged in work on the construction of a pump. The agreement was signed in England and by section 12 provided that it was to be construed and have effect in all respects in accordance with the law of England. It did not specify any obligation by the defendants for the care and safety of the plaintiff. On July 25, 1958, the plaintiff issued a writ claiming damages in respect of personal injury and loss due to the accident, and on January 19, 1959, obtained leave from Master Diamond to serve a concurrent writ out of the jurisdiction, namely, in Panama, where the defendants are resident.

The writ as amended read: "The plaintiff's claim is for

[1] R.S.C., Ord. 11, r. 1 (*e*): "Except in the case of a writ to which "rule 1A of this Order applies, service "out of the jurisdiction of a writ of "summons or notice of a writ of summons may be allowed by the court "or a judge whenever . . . (*e*) the "action is one brought against a "defendant not domiciled or ordinarily resident in Scotland, to "enforce, rescind, dissolve, annul or "otherwise affect a contract or to "recover damages or for relief for or "in respect of the breach of a contract (i) make within the jurisdiction or (ii) made by or through an "agent trading or residing within "the jurisdiction on behalf of a principal trading or residing out of the "jurisdiction, or (iii) by its terms or "by implication to be governed by "English law."

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"damages for personal injuries and loss sustained by the plaintiff as a result of an accident which occurred on or about the 28th day of May, 1957, in the course of his employment with the defendants in the Sheikdom of Kuwait, the said accident having been caused by breaches by the defendants, their servants or agents, of contracts of employment entered into between them and the plaintiff at or about the 30th day of April, 1957."

The defendants appealed, contending that the plaintiff's cause of action was in tort and not in contract, and therefore was not within the terms of Ord. 11, r. 1 (*e*) of R.S.C.,[1] and the service of the writ out of the jurisdiction should be set aside. On February 26, 1959, McNair J. dismissed the appeal.

The defendants appealed.

John Stocker for the defendants.

Geoffrey Howe for the plaintiff.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Smith* v. *Baker*[2]; *Maclenan* v. *Segar*[3]; *Denham* v. *Midland Employers Mutual Assurance Ltd.*[4]; *Lochgelly Iron and Coal Co.* v. *McMullan*[5]; and *Kelly* v. *Metropolitan Railway Co.*[6]

SELLERS L.J. The plaintiff in this action obtained leave to serve a writ out of the jurisdiction and it has in fact been served on the defendants in Panama. The defendants, who are now the appellants, applied, as they were entitled to under the rules, for the service of the writ to be set aside. That application came before Master Diamond who refused to set aside the service of the writ. McNair J. heard the appeal and he upheld the Master's refusal. The defendants have persisted and have appealed to this court, alleging that the decision not to set aside the service out of the jurisdiction is wrong in the circumstances of this case.

This court has had the advantage of an interesting and sustained argument from counsel for the defendants, who allege that the claim does not fall under Order 11, rule 1 (*e*) as it was held to have done by the Master who gave leave to serve out of the jurisdiction. It is said that it is a claim simply in respect of a tort committed, if at all, in Kuwait, and that there is no jurisdiction to order service out of the jurisdiction. As originally framed the writ does appear to have been a claim in tort but the writ was amended. So that no technical point can be taken about the state of the writ when the order was made, counsel for the defendants said that he accepted the

[1] For footnote 1 see p. 703.
[2] [1891] A.C. 325.
[3] [1917] 2 K.B. 325.
[4] [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561.
[5] [1934] A.C. 201.
[6] [1895] 1 Q.B. 944.

amendment and would take no point about it and, indeed, he was prepared, if it was so desired, to permit any further amendment of the writ without any objection, if his submission before this court at the present stage that the service out of the jurisdiction was not justified, is not sustained.

It appears that on April 30, 1957, the plaintiff entered into a written contract with the defendants. There was entered into concurrently another contract, a preliminary contract, to which no further reference need be made. In substance the agreement was for the plaintiff to go into the service of the defendants as a foreman millwright "in Kuwait or such other location in the "Near or Middle East (hereinafter referred to as 'the Zone of "'Operations') as the company may desire." The agreement was to begin on April 30, 1957. The plaintiff appears to have gone out at some time less than a month after the date of the agreement to Kuwait to carry out his duties under the contract, and unfortunately, on May 28, he met with an accident by falling into a trench when he was engaged in some work on the construction of a pump. He seems to have fallen into the trench because he stepped back into it when trying to avoid a load, swinging from a crane, which was coming towards him. Those facts are derived from an affidavit which the plaintiff put in at one stage in these proceedings.

In the course of that affidavit the plaintiff sets out the duty which he alleges the defendants had infringed. It is said: "It "was the duty of the defendants under and by virtue of the "aforesaid agreements to take all reasonable care by themselves, "their servants or agents, to provide and maintain safe premises, "plant and equipment at any place or places at which I was "to carry out my duties thereunder, and to institute, operate "and maintain a safe system of work and not to expose me "to any unnecessary risk of injury at any such place or places."

Counsel for the defendants has conceded that duties of that character did arise and the only point is whether they arose under this contract. The contention is that such duties arise in tort and not under contract. The importance of that in this particular case is apparent when one turns to the circumstances in which a writ can be served out of the jurisdiction. The plaintiff, at the time in 1958 when he sought to bring these proceedings, had returned to England. The accident happened out in Kuwait. It appears that the defendants are resident in Panama and that is where the writ was in fact served. In those circumstances the plaintiff, seeking to bring his action in these courts and serve out of the jurisdiction, relies on the provisions of Order 11, rule 1 (*e*). [His Lordship read the rule and continued:] The rules under Order 11 are to be read disjunctively and each subsection is complete in itself and independent of the others: *Tassell* v. *Hallen*.[1]

[1] [1892] 1 Q.B. 321.

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The question that has arisen in this case is whether the plaintiff can properly present his case as a case for damages for breach of contract.

The contract, which is a long, printed document, signed by the parties, contains no express reference to the duties placed upon the employers in respect of their standard of care with regard to the premises in which they were engaging the plaintiff to work, or with regard to the provision of plant which he was to use, or with regard to the system of work in which he had to co-operate. Clause 11 of the agreement is a clause dealing with the working conditions, but it imposes obligations only on the employee and makes no reference to the obligations in respect thereof on the part of the employers. Clause 12 of the agreement, which was relied on, is in my view not helpful to the defendants' argument when they seek to say that the agreement does not permit of any implied term with regard to the matter of taking reasonable care for the plaintiff's safety in the course of the work. The clause provides, and admittedly it prevails in this respect, that the agreement "shall be construed and have "effect in all respects in accordance with the law of England." It seems to me that the law of England is one which does permit terms in these matters to be implied into the contract. So far it is against the contention that the agreement can have no such implication.

The other part of Clause 12 is as follows: "The agreement "embodies the whole arrangements between the parties with "reference to the employment agreement hereby constituted, "and all previous correspondence and negotiations, whether oral "or written, shall be excluded." I think none of those terms is anything like adequate to exclude or, indeed, was ever intended to exclude, any term which would normally be implied into the contract if in fact there are such terms. That is the agreement.

The right of the plaintiff to invoke the procedure under Order 11, to which I have referred, is dependent upon whether the action which he seeks to bring is one in respect of a breach of contract and turns on whether the matter of which he complains is the subject of a contract, or whether, as the defendants allege, it is only a matter of liability in tort. I am bound to say that from such experience as I have had in this branch of the law I should have held the view, quite apart from recent high authority, that the claim which the plaintiff would wish to make here could be made either in tort or in contract. It has surely been frequently so pleaded without exception being taken. But Mr. Stocker, in his argument, has referred to a good many authorities and has argued with some persistence that this type of claim can arise only in tort and cannot be framed in contract.

I should turn at once, not to the old authorities, but to the more recent ones because, as it chances, the matter was considered recently in the House of Lords. The latest case is *Davic*

v. *New Merton Board Mills Ltd.*,[2] where the question arose whether the employers were liable for defects in some tool which they had bought in the open market for the use of their workman, who was injured by reason of some defect in the tool. In considering the question, Lord Simonds made certain observations from which I read a very brief extract[3]: "The same act "or omission by an employer may support an action in tort or "for breach of an implied term of the contract of employment, "but it can only lead to confusion, if, when the action is in tort, "the court embarks on the controversial subject of implied con-"tractual terms."

In truth, the difference between a claim in tort and a claim in contract, at any rate in its more conventional form, without alleging any special implied term, or any very special obligation, is very rarely one which calls for any consideration at all. The difference between the two in the majority of circumstances does not matter. It may be that it is because of that that the majority of the cases have not dealt with it in the way one might have expected to find. So far as I can see, the distinction matters in two cases—there may be others—one, where there is a desire to serve out of the jurisdiction, which is the very case we have now under consideration; another has arisen and may arise in the county court jurisdiction where the basis of costs may be different according to whether the action which is brought and decided in the county court was framed in contract or in tort. But the matter is not much aided there so far as the solution of this case is concerned because of the fact that the costs in the county court are higher in respect of a claim for tort than in the case of contract and the action would certainly be more normally framed in tort rather than in contract. The position is somewhat different at the end of the case when costs come to be considered in the county court, when it will be known whether the action, as it has been contested before the court, has been contested as a matter of contract or as a matter of tort.

The issue for consideration now is whether this action can for the purposes of this rule be framed in contract. I have referred to what Lord Simonds said in *Davie* v. *New Merton Board Mills Ltd.*[3] Lord Reid made some observations which are more helpful to the defendants in this matter. He said[4]: "A master's duty to his servant with regard to the safety of "plant supplied should, I think, be regarded as part of the law "of tort. Vicarious liability is well recognised and I see no "difficulty in principle in extending vicarious liability beyond "liability for those who are, strictly speaking, servants, but it "would, I think, be going far beyond anything reasonable to "extend it to cover a case where there was no relationship "whatever between the master and the negligent person or his

[2] [1959] 2 W.L.R. 331.
[3] Ibid. 336.
[4] Ibid.

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"employer at the time when the negligence occurred. Then I "take the other possible way of regarding the master's duty. It "was common at one time to regard it as depending on the "contract of employment, and indeed, it was this view which "was largely responsible for the convention of the rule of com-"mon employment. No doubt this view leaves the court much "scope, but I think it has always been recognised that an im-"plied term must at least be reasonable." Then he went on to consider the proposed implied term in the case, so that one cannot say that Lord Reid was coming down without any qualification on the side of this particular claim being founded only in tort and not upon the basis of contract or implied term.

Indeed, it would appear that the balance of opinion in the cases over a long period, going back to 1861, and from there onwards, has been that the action may be framed within limits on either basis. The House of Lords had occasion to consider the matter in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[5] It is true that in that case the House was looking at the obligations imposed by the contract of service on the workman, but notwithstanding the contention of Mr. Stocker to the contrary, I think that the reasons which establish that terms which place an obligation of care under the contract can be implied in the case of a workman apply equally and even more obviously to the case of the obligation of an employer. I turn first to what Lord Simonds said[6] on this topic with which we are concerned: "I have already said that it does not appear to me to make any "difference to the determination of any substantive issue in this "case whether the respondents' cause of action lay in tort or "breach of contract. But, in deference to Denning L.J., I "think it right to say that I concur in what I understand to "be the unanimous opinion of your Lordships that the servant "owes a contractual duty of care to his master, and that the "breach of that duty founds an action for damages for breach "of contract, and that this (apart from any defence) is such a "case. It is trite law that a single act of negligence may give "rise to a claim either in tort or for breach of a term express "or implied in a contract. Of this the negligence of a servant "in performance of his duty is a clear example."

Lord Radcliffe reveals[7] that the same sort of argument which has been advanced here arose in the House of Lords: "It was "much canvassed in argument before your Lordships whether, "if there was some such duty on the appellant, it was anything "more than the general duty he owed the world to avoid the "tort of negligence. On one view of the case this would indeed "be a question of some importance in respect of costs. Since "I take a different view as to the proper result of the case "anyway, I do not need to dwell on this part of it. It is per-"haps sufficient if I say that, in my view, this question is a

[5] [1957] A.C. 555; [1957] 2 W.L.R. 158; [1957] 1 All E.R. 125.

[6] [1957] A.C. 573.

[7] Ibid. 587.

"somewhat artificial one. The existence of the duty arising out "of the relationship between employer and employed was recog-"nised by the law without the institution of an analytical inquiry "whether the duty was in essence contractual or tortious. What "mattered was that the duty was there. A duty may exist by "contract, express or implied. Since, in any event, the duty "in question is one which exists by imputation or implication "of law and not by virtue of any express negotiation between "the parties, I should be inclined to say that there is no real "distinction between the two possible sources of obligation. "But it is certainly, I think, as much contractual as tortious. "Since in modern times the relationship between master and "servant, between employer and employed, is inherently one of "contract, it seems to me entirely correct to attribute the duties "which arise from that relationship to implied contract. It is "a familiar position in our law that the same wrongful act may "be made the subject of an action either in contract or in tort "at the election of the claimant, and, although the course chosen "may produce certain incidental consequences which would not "have followed had the other course been adopted, it is a "mistake to regard the two kinds of liability as themselves "necessarily exclusive of each other."

Lord Tucker begins his speech by stating his view [8] "that a "servant employed to drive a vehicle in the course of his employ-"ment by his master owes a duty to his master to take reasonable "care in the driving and management of the vehicle, that for "breach of this duty an action founded on contract can be "brought by the master against the servant, and that damages "which have been awarded against the master by reason of the "servant's negligence or breach of this duty are not too remote "to be recoverable in the master's action against his servant." Later Lord Tucker said [9]: "Some contractual terms may be "implied by general rules of law. These general rules, some of "which are now statutory, for example, Sale of Goods Act, Bills "of Exchange Act, etc., derive in the main from the common law "by which they have become attached in the course of time to "certain classes of contractual relationships, for example, land-"lord and tenant, innkeeper and guest, contracts of guarantee "and contracts of personal service. Contrasted with such cases "as these are those in which, from their particular circumstances, "it is necessary to imply a term to give efficacy to the contract "and make it a workable agreement in such manner as the parties "would clearly have done if they had applied their minds to the "contingency which has arisen. There are the 'officious by-"'stander' type of case, to use MacKinnon L.J.'s well-known "words. I do not think the present case really comes in that "category, it seems to me to fall rather within the first class "referred to above." Then he sets out some of the recognised

[8] [1957] A.C. 592. [9] Ibid. 594.

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implied terms that the contract imposed on the servant in the contract of service between him and the employer.

The argument of counsel for the defendants was that the common law had imposed certain duties upon employers in regard to the safety of the workman in the course of his work but the obligation so imposed, it was said, was entirely in tort. That the duties arose from the common law I think is established. That was the view of the law taken in *Wilsons and Clyde Coal Co.* v. *English*.[10] I do not need to make any citation from it. The admitted obligations which are imposed on the employer were restated in that case by Lord Wright, who cited from the speech of Lord Cairns in *Wilson* v. *Merry*.[11] The question is whether those duties are contractual duties. The authorities to which I have referred show that they may be implied terms of the contract, attached to or incorporated in the contract, to apply Lord Tucker's view. It is at the election of the workman in circumstances such as these whether, relying on the recognised common law duties as established by Lord Cairns' speech in *Wilson* v. *Merry*[11] and following decisions, he will sue in contract or sue in tort. In this case, if it suits his purpose, he may sue in contract. It may be that that will have a somewhat limiting effect on his rights against the employer as compared with his more extensive right at common law if he sues in tort, but I make no further comment on that.

These authorities seem to me to establish that on the facts of this case an action does lie in contract, and on the basis of these implied terms which the plaintiff seeks to invoke. If he establishes a breach of those terms then he would appear to have a cause of action entitling him to damages.

I do not wish to prolong this judgment on an interlocutory matter by referring to cases quoted by counsel for the defendants with regard to costs in the county court. I think they approach the matter from a different point of view, dependent on how the action was, in fact, contested before the court, and do not help in any way his argument that an action does not lie for breach of contract.

Counsel for the defendants did rely on passages in Salmond on Torts, 12th ed., at p. 130, where there was an extract incorporated in the context from a work by Munkman, pp. 60 and 61, to the effect that, although the relationship of master and servant is based upon contract, this obligation is imposed by the law of tort and is not to be regarded as an implied term in the contract of service. Those passages do require consideration in the text of the authorities I have quoted. Also counsel referred to a passage in Bullen and Leake, 3rd ed., p. 363, and from that he derived an authority in 1861 of *Riley* v. *Baxendale*,[12] in which the court there, consisting of Pollock C.B., Martin and

[10] [1938] A.C. 57, 81; [1937] 3 All E.R. 628.

[11] (1868) L.R. 1 Sc. & Div. 326, 332.

[12] (1861) 6 H. & N. 445.

Wilde BB., expressed the view that such an action as was contemplated here could not be framed in contract. There the declaration alleged that "J. R. was a servant of the defendants "on the terms that the defendants should take due and ordinary "care not to expose the said J. R. to extraordinary danger and "risk in the course of his said employment," and it was held that those terms could not be made the subject of a claim in contract. It was put in this way by Martin B.: "There has been a series "of cases in which the duty of the master has been improperly "declared upon as a contract. This imposes a difficulty on the "defendant by making it impossible for him to demur, and that "all he can do is to deny the contract. I am of opinion that on "the hiring of a servant no such contract as this is to be implied; "there is a mere contract of service."

The other judgments are to the same effect. Mr. Howe, on behalf of the respondent to the appeal, the plaintiff, sought to say that the decision turned on procedure. I am inclined to think that case expresses a view of the law contrary to that which has been expressed in the House of Lords and which I have been expressing here. I think the best way to deal with that case is to say that it goes into the limbo of lost causes.

In my view, this appeal fails, and the view taken by the master and the judge in this matter was the correct view and should not be interfered with. Therefore, the appeal must be dismissed.

WILLMER L.J. My Lord has covered the ground so fully that I find it unnecessary to say anything more than that I wholly agree with what has fallen from him.

Appeal dismissed.

Solicitors: *L. Bingham & Co.; Denton, Hall & Burgin.*

A. W. G.

[HOUSE OF LORDS.]

SKEGNESS URBAN DISTRICT COUNCIL . APPELLANTS;

AND

DERBYSHIRE MINERS' WELFARE COMMITTEE . . . . . RESPONDENTS.

H. L. (E.)*

1958 *Dec.* 15, 16, 17.

1959 *Mar.* 24; *April* 30.

Rates and Rating—"Social welfare"—Health—Miners' welfare holiday camp—Premises occupied by trustees—Organisation not established or conducted for profit—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2, *c.* 9), *s.* 8 (1) (*a*).

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD KEITH OF AVONHOLM and LORD DENNING.

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By section 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, rating relief was granted in respect of any hereditament which in terms of subsection (1) (*a*) was "occupied for "the purposes of an organisation . . . which is not established or "conducted for profit and whose main objects are charitable or "are otherwise concerned with the advancement of religion, educa-"tion or social welfare."

A hereditament was occupied for the purpose of a holiday centre for coal mine workers in Derbyshire. The camp, which was managed by trustees, was provided by the social welfare organisation set up under section 13 of the Miners' Welfare Act, 1952, which obtained the necessary funds from the National Coal Board. The trustees sought to make neither a profit nor a loss. Coal mine workers, their wives and children, were accommodated, paying certain charges:—

Held, that the provision of a holiday centre, the main object of the organisation which occupied the hereditament was "the "advancement of . . . social welfare" and, accordingly, rating relief should be granted in respect of them. The fact that the funds were not provided benevolently or altruistically by a donor was immaterial, and so was the fact that the benefit was provided for only a limited class of the community.

The artificial considerations which distinguished the law of charity were not to be imported into the latter half of the subsection.

Decision of the Court of Appeal [1958] 1 Q.B. 298; [1957] 3 W.L.R. 1048; [1957] 3 All E.R. 692 affirmed.

APPEAL from the Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 19, 1957, after a hearing on November 13 and 17, 1957, dismissing an appeal by the appellants, the Skegness Urban District Council, from an order of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J., Hilbery and Donovan JJ.) made on May 15, 1957, reversing an order of the general court of quarter sessions in and for the County of Lincoln (Parts of Lindsey) made on September 18, 1956. The order of the court of quarter sessions had dismissed an appeal by the respondents, the Derbyshire Miners' Welfare Committee, against their rating for general rating purposes for the urban district of Skegness as the occupiers of certain premises described as a holiday camp and premises numbered 4029 in the rates for the year ending March 31, 1957, and claiming that they were entitled in respect of that hereditament to the benefit of the relief against rates provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. By order of the Divisional Court the appeal was to be allowed and judgment was to be entered at quarter sessions for the respondents in lieu of the order of quarter sessions that the appeal should be dismissed.

The facts are fully stated in the opinion of Viscount Simonds.

Sir Arthur Comyns Carr Q.C. and *Charles Scholfield* for the appellants.

Geoffrey Cross Q.C. and *J. M. Milne* for the respondents.
John Brunyate for the Charity Commissioners.

The following authorities, besides those referred to in their Lordships' opinions, were cited in argument: *Battersea Borough Council* v. *British Iron & Steel Research Association*[1]; *In re Compton*[2]; *Hall* v. *Derby Sanitary Authority*[3]; *In re Hobourn Aero Components Ltd.'s Air Raid Distress Fund*[4]; *Williams' Trustees* v. *Inland Revenue Commissioners*[5]; *Stag Line Ltd.* v. *Foscolo Mango & Co. Ltd.*[6]; *Inland Revenue Commissioners* v. *Baddeley*[7]; *City of Westminster* v. *Southern Railway Co.*[8]; *Robinson Brothers (Brewers) Ltd.* v. *Durham Assessment Committee.*[9]

Their Lordships took time for consideration.

1959. April 30. VISCOUNT SIMONDS. My Lords, the short question in this case is whether the respondents, a body known shortly as the Derbyshire Miners' Welfare Committee, as the occupiers of a certain hereditament in the urban district of Skegness, which I will describe later, are entitled to the benefit of the relief against rates provided by section 8 (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. This question has been decided in their favour by the Court of Appeal affirming a decision of a Divisional Court of the Queen's Bench Division. The contrary had been decided by the general court of quarter sessions in and for the County of Lincoln (Parts of Lindsey).

It will be convenient to refer first to the relevant statutory provision, but I will remind your Lordships that previously no charitable or kindred institution (with certain immaterial exceptions) could as of right claim exemption from any general rate. Some rating authorities had, however, been accustomed to make sympathetic assessments on charitable organisations as a matter of grace. Uniformity was introduced by the subsection to which I have referred. It provided as follows: "(2) For the purposes "of the making and levying of rates in a rating area, for the "year beginning with the date of the coming into force of the "first new valuation list for that area (in this section referred "to as 'the first year of the new list'), and for any subsequent "year, the amount of rates chargeable in respect of a heredita- "ment to which this section applies shall, subject to the following

[1] [1949] 1 K.B. 434; 65 T.L.R. 183.
[2] [1945] Ch. 123; 61 T.L.R. 167; [1945] 1 All E.R. 198.
[3] (1885) 16 Q.B.D. 163; 2 T.L.R. 81.
[4] [1946] Ch. 194; 62 T.L.R. 313; [1946] 1 All E.R. 501.
[5] [1947] A.C. 447; 63 T.L.R. 352; [1947] 1 All E.R. 513.
[6] [1932] A.C. 328; 48 T.L.R. 127.
[7] [1955] A.C. 572; [1955] 2 W.L.R. 552; [1955] 1 All E.R. 525.
[8] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.
[9] [1938] A.C. 321; 54 T.L.R. 568; [1938] 2 All E.R. 79.

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"provisions of this section, be limited as follows, that is to say: "(a) for the first year of the new list, the amount so chargeable "shall not exceed the total amount of rates (including any "special rates) which were charged in respect of the hereditament "for the last year before the new list came into force."

Subsection (1) of the same section was as follows: "This "section applies to the following hereditaments, that is to say: "(a) any hereditament occupied for the purposes of an organisa- "tion (whether corporate or unincorporate) which is not established "or conducted for profit and whose main objects are charitable "or are otherwise concerned with the advancement of religion, "education or social welfare; . . ."

Uniformity was further secured by the fact that by the Local Government Act, 1948, the duty of making and amending valuation lists was transferred from the rating authority to the Valuation Officers of the Commission of Inland Revenue. The first general revaluation undertaken by them became effective on April 1, 1956, from which date also the present claim to relief took effect.

My Lords, though I have been able to state the question very shortly, I find the facts extremely obscure.

In the rate book for the year ending March 1, 1956, the respondents were shown as the occupiers of the hereditament in question described as "holiday camp and premises" with a rateable value of £1,476 and the rate payable was £1,758 18s. 0d. In the following year they were shown as occupiers of the same hereditament but the rateable value was shown as £3,800 and the amount of rate as £3,040. Against this assessment they duly appealed to quarter sessions and I have already stated the result of the proceedings up to the appeal to this House.

So far all is clear, but, when I come to the case stated by the justices, upon which the appeal proceeded, I find a great deal of confusion. I do not seek to apportion the blame for this state of affairs except to say that it would not be fair to lay any responsibility for it upon the justices or their clerk. In paragraph 8 of the case it was said that the following facts were proved or admitted (I paraphrase them) (i) that the respondents were in fact the trustees of a trust known as the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre; (ii) that "the "Derbyshire Miners' Welfare Committee" was the short name by which they were generally known; and (iii) that they at all material times occupied the hereditament in question (and a further hereditament used as a convalescent home) for the purpose of a convalescent home and holiday centre for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire). Details of the hereditament with particulars of the buildings upon it were then given and it was stated that the camp was provided by the social welfare organisation set up under section 13 of the Miners' Welfare Act, 1952, which obtained the necessary funds from the National Coal Board. It was further

found that the organisation only made grants for capital expenditure and that it had always been their practice in doing so to make it a condition that the trustees would be responsible for maintenance and operational expenses. They further found that it was being run by trustees who sought to make neither a profit nor a loss on their operations. It is to be noted that this finding has not been challenged. They found also that the trust was the subject of an order made by the Charity Commission on February 20, 1953, and they referred to various admissions of which I may mention these, that the only persons attending the holiday centre were workers in or about coal mines in the district of Derbyshire (excluding South Derbyshire), their wives and children, but that, if all the vacancies were not filled by these persons, they were filled by applicants from other coal fields, that generally there were no vacancies left to be filled by applicants from other coal fields, that a charge varying from £5 15s. 0d. for an adult to £1 10s. 0d. for a small child was made for a week's holiday accommodation and full board, which charge included the return rail or omnibus fare from the visitor's home to Skegness, and that drinks and other refreshments were sold to persons staying at the holiday centre, alcoholic drinks being acquired by such persons as members of a club and in the winter by local residents who became members of the club and that a substantial profit was made out of the supply of drink but that the charge for accommodation was so fixed that taking all the operations together the trustees made neither a profit nor a loss.

I need not state the contentions of the parties before the justices beyond saying that the respondents contended that the purposes of the trust were charitable or (alternatively) were concerned with the advancement of social welfare while the appellants denied both contentions.

The justices were of opinion that the purposes of the trust were not charitable and were not otherwise concerned with the advancement of social welfare.

I call attention to the fact that the justices proceeded on the footing that the trust upon which the hereditament was held was that created by the scheme made by the Charity Commissioners but nevertheless thought that they were not thereby precluded from saying that it was not charitable.

But, my Lords, when upon appeal the case reached the Divisional Court, for the first time, it was said, and not denied, that the governing document was not the scheme made by the Charity Commissioners but a lease of December 6, 1940, which had not been produced at the hearing before the justices, and it was upon the footing that the trusts declared by this lease were operative that the appeal was thenceforward argued. The scheme was ignored. No communication appears to have been made either to the Charity Commissioners or to the Attorney-General. This was an irregular course upon any view, but the more irregular because the trustees, abandoning the scheme, abandoned also the

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argument that the trust upon which the property was held was charitable. For the trust declared by the lease could not (apart possibly from the validating effect of the Recreational Charities Act, 1958) be so regarded. Counsel for the trustees were in fact content to rest their case on the alternative claim that the hereditament was occupied "for the purposes of an organisation . . . "which is not established or conducted for profit and whose main "objects are . . . otherwise concerned with the advancement of "social welfare," and they may perhaps regard the success that has so far attended them as justifying that course. I have felt some doubt whether, even at this stage, it would not be the proper course to remit the case to quarter sessions for a restatement of the case and I should have had no hesitation in advising your Lordships to do so, if I had not been of opinion that the appeal must in any event fail. As matters stand, I propose therefore to deal with the case as it has been presented to the House.

It is necessary, then, to turn to the lease of December 6, 1940. The parties thereto of the first part, the lessors, were a number of persons described as "the trustees on behalf of the Derbyshire "District Miners' Welfare Committee" and the parties of the second part thereinafter called "the trustees" were a number of persons described as "the trustees on behalf of the Derbyshire "District Miners' Holiday Centre." It recited that by section 20 of the Mining Industry Act a fund was established, which was thereinafter called the "miners' welfare fund," to be applied to purposes connected with (inter alia) the social well-being, recreation and conditions of living of workers in or about coal mines, and the duty of allocating money from the said fund was vested in the committee, thereafter called "the Miners' Welfare Com-"mittee" appointed under subsection (3) of the said section as varied by section 1 of the Mining Industry (Welfare Fund) Act, 1935, and section 15 of the Mining Industry Act, 1926, that a committee styled the "Derbyshire District Miners' Welfare Com-"mittee" constituted as therein mentioned had been set up to advise the Miners' Welfare Committee in regard to allocations from the said fund for the purposes aforesaid within the said district and that the latter committee had on the advice of the former allocated a sum of £35,000 for the purpose of providing a holiday centre for the use and benefit of workers in or about coal mines and more particularly such of them as were resident in the Derbyshire district, and that the trustees had been appointed to administer the said sum and such other sums, if any, as might thereafter be allocated, given or bequeathed, for the purposes of the trusts thereinafter declared. It was then, by the deed, witnessed that the lessors demised the hereditament which is the subject-matter of this appeal to the trustees for the term of 21 years from January 1, 1939, at a yearly rent of £200. The trustees entered into the usual lessee's covenants and, after a number of other provisions which need not be stated, they declared that they would "permit the demised premises to be used

"for the purpose of a holiday centre and a recreation or pleasure "ground for the benefit of workers in or about coal mines em- "ployed by collieries in the Derbyshire district (including the "dependants and invitees of such workers)." The lease also contained a provision in regard to keeping accounts and methods of charging which were relevant to the question whether the "organisation" was "established or conducted for profit" but, as that is not now suggested, it need not be further stated.

Much still remains obscure. It is not clear what was the relation of the parties to the lease to each other, nor in whom the hereditament was originally vested. It does not appear either from the recitals in the lease or from the case stated how the sum of £35,000 mentioned in the recitals was in fact expended, nor do the voluminous accounts which were put in evidence give any sure guide. I will, however, assume, as it has throughout been assumed, that this sum was in some way, either by purchase of the land or by the erection of buildings upon it, expended for the purpose of a camp and holiday centre and that those who made use of it therefore got a benefit which could not be regarded as unsubstantial. I can also assume—and in this respect some assistance can be derived from the case stated—that upon the passing of the Miners' Welfare Act, 1952, the property passed to a body set up under that Act and called "the Social Welfare "Organisation" to which the National Coal Board was under an obligation to pay sums necessary to meet the estimated costs of social welfare activities. These activities were defined as meaning "activities concerned with the maintenance or improve- "ment of the health, social well-being, recreation, or conditions "of living of persons employed in or about coal mines" or their dependants. It is also pretty clear that the sum of £35,000 to which I have referred was not derived from any voluntary contributions but was the fruit of a compulsory levy and that any other sums that may be necessary for the maintenance of the camp, so far as it is not met out of charges to the beneficiaries, are provided by the National Coal Board. It is this fact upon which the appellants largely rely.

My Lords, I turn again to the relevant section and note first the curious wording "occupied for the purposes of an organisa- "tion . . . whose main objects," etc. It is by no means clear to me what is the "organisation" whose main objects have to be considered. Is it the "Social Welfare Organisation" set up under the Act of 1952 to which I have already referred? Or is it the body of trustees who appear in fact to manage the holiday centre, or is it a committee, whether the Miners' Welfare Committee which has been mentioned or some other committee? It is not a satisfactory way of disposing of the case, but I see no alternative to saying that, whatever the "organisation" may be, its main object is nothing else than the provision of a holiday centre such as is described in the case. If so, the question is

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whether such a provision is concerned with the advancement of social welfare.

My Lords, this question surely admits of only one answer. I agree with what has been said by Donovan J. and Ormerod L.J. on this point. It is unnecessary and probably impossible to give a comprehensive definition of social welfare. But it would be a strange definition which was not wide enough to include what is, under modern conditions, widely regarded as so important to happiness and general well-being as a so-called holiday centre. If this is so, why is not the hereditament here in question entitled to the benefit of the section? The alleged reasons appear to be these.

In the first place, the appellants rely, as I have already indicated, on the fact that the holiday centre was provided and maintained by a statutory levy or by contributions from the National Coal Board so far as it was not provided and maintained at the expense of those who made use of it. They urge that a trust or institution cannot be regarded as charitable if it is not created by the benevolence of a donor or donors and that that element is absent in the present case. Next, they say, that just as benevolence or altruism is a necessary element in legal charity, so an object of an organisation cannot be regarded as "otherwise "concerned with the advancement of social welfare" unless it too has such an element. I accept neither of these propositions. The crucial test is the purpose to which money is devoted, not the source from which it is derived, see *Attorney-General* v. *Eastlake*.[1] An elaborate argument was addressed to us to show that the decision in that case was based on a misunderstanding of what Lord Eldon said in *Attorney-General* v. *Dublin Corporation*.[2] But, whether this be so or not, the decision has never, so far as I know, been questioned, and I think it was clearly right.

In the next place, the appellants argued that the provision of a holiday centre in the present case did not advance social welfare because it provided a benefit for only a limited class in the community. Once again recourse was had to the analogy of charity law, and *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[3] and similar cases were invoked to support this proposition. I make the answer that I made to the first argument. There is no justification for supposing that the legislature intended to import the highly artificial considerations, which distinguish or disfigure the law of charity, into the latter part of the subsection. Neither the words themselves nor the context demand it and I think that all the court has to do is to forget all the refinements of charity law and ask itself the simple question that I have already posed. I do not doubt that there will be border-line cases, but it does not appear to me that in the present case the question is difficult to answer.

[1] (1853) 11 Hare 205.
[2] (1827) 1 Bligh N.S. 312.
[3] [1951] A.C. 297; [1951] 1 T.L.R. 118; [1951] 1 All E.R. 31.

Thirdly, it was argued that some distinction is to be made between the "advancement" of social welfare and the provision of social welfare and that in the present case the "organisation" whose main object we are considering (whatever that organisation may be) is not the advancement of social welfare but merely the provision of a holiday centre. Upon this point, which seems to me to be little more than playing with words, I will, with respect, adopt what Ormerod L.J. said. The provision of a holiday centre of this nature appears to me precisely to be "concerned with the "advancement of social welfare."

My Lords, before I conclude this opinion, I must revert for a moment to a matter upon which I have already made some observations. I have pointed out that the Divisional Court and the Court of Appeal alike disregarded the fact that a scheme had been made by the Charity Commissioners which, if it was valid, imposed upon the land, the subject of the contested rate, trusts different from those created by the 1940 lease. At the end of the original hearing before this House it appeared to their Lordships that this course ought not to be adopted without at least giving the commissioners an opportunity of being heard. They accordingly adjourned the hearing and at the adjourned hearing the commissioners attended by counsel and contended that, except as to some parcels of land comprised in the scheme, they had validly exercised their discretion. They were, however, willing (as were counsel for the appellants and the respondents) that, so long as their position was not prejudiced, the case should be decided upon the footing that the respondents at the relevant time in fact occupied the land in question upon the trusts created by the 1940 lease, i.e., upon the footing upon which the case was decided in the courts below. In these circumstances, since that is, in any view, the footing most favourable to the appellants, their Lordships agreed to take an unusual and generally undesirable course and decide the case upon what may, after all, prove to be a false assumption.

I have already stated the conclusion to which, upon this footing, they have come. The appeal must be dismissed, but, in dealing with the costs they must have regard to the fact that the respondents did not, until the case reached the Divisional Court, produce the 1940 lease, which then became the most material document, and did not, until the appeal had been opened in this House, produce other documents, which, had they been at the outset made known to the appellants, might have affected their conduct in these proceedings. The order will be that the parties will bear their own costs of this appeal except that the respondents must pay the appellants' costs of the adjourned hearing on March 24. The Charity Commissioners will bear their own costs.

My noble and learned friend, Lord Morton of Henryton, who is unable to be here today, has asked me to say that he concurs in the opinion which I have just read.

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Skegness Urban District Council v. Derbyshire Miners' Welfare Committee.

Lord Reid. My Lords, I concur.

Lord Keith of Avonholm. My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

Lord Denning. My Lords, for nearly 40 years the coal industry has built up a special fund for welfare purposes. In the early days it was done by means of a compulsory levy on colliery owners and royalty owners. In recent times it has been done by way of grants by the National Coal Board. The fund has been held and controlled by various bodies, at first by a Miners' Welfare Committee, then by a Miners' Welfare Commission, and latterly by the Coal Industry Social Welfare Organisation. These bodies have all followed one another, each taking over from the one before, so I may perhaps describe them all as the "Social "Welfare Organisation."

The Social Welfare Organisation has applied the fund in promoting the social well-being, recreation, and conditions of living of mine workers. It has done this in accordance with statutory provisions in that behalf. One of the activities which it has supported is a holiday centre at Skegness. This is especially for the use of miners from North Derbyshire. It is situated on an extensive piece of land next to the sea and comprises a holiday camp complete with chalets, kitchen, dining-hall, theatre, bars, lounges, shops and so forth.

The Social Welfare Organisation provided the capital moneys by which this holiday centre was acquired and built. The justices at quarter sessions find that "this camp was provided by the "Social Welfare Organisation." The legal title is not, however, vested in the Social Welfare Organisation. It was at one time vested in a district committee but it has since been vested in the Official Trustee of Charity Lands: and it is included in a scheme prepared by the Charity Commissioners. The justices at quarter sessions so found, and their findings have, I think, been in substance re-established by the material brought before your Lordships by the Charity Commissioners.

The Social Welfare Organisation has not itself administered or managed the holiday centre. This has been done, under the authority of the scheme, by a committee of eight persons, all of whom are connected with the coal industry in the East Midlands. Four of them are appointed by the employer's side (the National Coal Board) and four by the men's side (the National Union of Mineworkers). These eight persons are described as "The Derbyshire Miners' Welfare Committee." They are, say the justices, the occupiers of the holiday centre. They are liable therefore for the rates payable on it. They also, I may remark, run a convalescent home next to the holiday centre.

The only persons who use the holiday centre are mine workers and their families. The charge is £5 15s. 0d. for an adult and £1 10s. 0d. for a child. For this they get a week's holiday with

full board and return fare to and from Skegness. The charge for accommodation is thus very modest. This is because the committee do not seek to make any profit. Nor do the committee have to pay any rent. And they make a substantial profit on drinks and this is used to lower the charge for accommodation.

Such being the facts, if I were asked: "For what purpose is "the land used? Is it used 'for the advancement of social "'welfare'?" I should probably say "Yes." But I would hasten to point out that the question is not "For *what* purpose is "the land used?" The question is: "For *whose* purpose is it "used?" or more accurately: "For the purposes of *what organisa-* "*tion* is it used, or rather occupied?" Many a holiday camp is used for similar purposes to this one. The holiday camps of Messrs. Butlin provide holidays at low cost for people who could not otherwise afford them, but they do not obtain relief from rates on this score. The reason is because that organisation does not qualify under section 8 (1) (*a*). Again, many convalescent homes obtain relief, but only if the relevant organisation qualifies. The convalescent home in *National Deposit Friendly Society Trustees* v. *Skegness Urban District Council*[4] did not get relief, because the friendly society did not qualify.

And I would add that it is not always right to take the occupier and treat him as the "organisation." In the case of a members' club, the committee of management occupy the club house, but it is occupied, not for the purposes of the committeemen, but for the purposes of the club itself. The relevant organisation is the club itself—the unincorporated association—and in order to get relief from rates, the club itself must qualify under section 8 (1) (*a*).

What then is the relevant organisation in the present case? This is the crucial question, but it does not appear to have been discussed in the courts below. The relevant organisation may be the eight persons on the committee who run the holiday centre. Or it may be the Social Welfare Organisation which has provided, and still provides, all the capital moneys that are needed. But neither of these organisations confine their activities to the holiday centre alone. The main object of the committee of eight, as appears from the scheme, is to provide and maintain a convalescent home for the miners of North Derbyshire, and subject thereto, a holiday centre for them. The main object of the Social Welfare Organisation, as appears from the Act of 1952, is to support and carry out "social welfare activities" throughout the coal industry of this country. But the discussion in the courts below has been on the footing that the relevant organisation (whatever it is) has as its sole object the provision of the holiday centre: and attention has therefore been concentrated on whether that object alone is concerned with the advancement of social welfare. Your Lordships have been invited to deal with the

[4] [1958] 3 W.L.R. 172; [1958] 2 All E.R. 601.

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case on this same footing and I suppose you may. All I am concerned to point out is that it is not the right footing. But taking it as the only question, I agree that the provision of this holiday centre is concerned with the advancement of social welfare. It fulfils all the criteria laid down by this House in the case of the *National Deposit Friendly Society*.[4] I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Wrentmore & Son; Donald H. Haslam for Lawrence C. Jenkins, Nottingham; Treasury Solicitor.*

F. C.

[4] [1958] 3 W.L.R. 172.

[PRIVY COUNCIL.]

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April 20.

DORIS CAROLINE MARY LEAHY AND OTHERS APPELLANTS;
AND
ATTORNEY-GENERAL FOR NEW SOUTH WALES AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Charity—Religion—Charitable and non-charitable purposes—Trust for "Order of Nuns of the Catholic "Church or the Christian Brothers"—Non-charitable orders among "orders of nuns"—Gift an endowment to order selected—Orders perpetual in form—Failure of gift to a non-charitable order—Trust validated under statutory provision that no trust rendered invalid by inclusion of non-charitable purpose—Trust for provision of amenities in convents—Composite expression embracing both charitable and non-charitable purposes—Saved by same statutory provision —Conveyancing Act, 1919–1954 (*N.S.W.*), *s.* 37*D*.
Charity—Endowment or gift to members of association.

A testator, who died in 1955, by his will, made in 1954, provided by clauses 3 and 5: "3. As to my property known as 'Elmslea' . . . "upon trust for such order of nuns of the Catholic Church or the "Christian Brothers as my executors and trustees shall select . . ." "5. As to all the rest and residue of my estate both real and "personal . . . upon trust to use the income as well as the capital "to arise from any sale thereof in the provision of amenities in "such convents as my said executors and trustees shall select either "by way of building a new convent . . . or the alteration of or "addition to existing buildings occupied as a convent or in the "provision of furnishings in any such convent or convents . . . the "receipt of the Reverend Mother . . . of that particular order of "nuns or convent shall be a sufficient discharge . . . for any payment under this clause."

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD SOMERVELL OF HARROW and LORD DENNING.

It was not disputed that the phrase "orders of nuns" was not used in its strict canonical sense, but included also Congregations of Sisters, and among the orders were contemplative orders, which were not regarded as charitable in the legal sense of that word. By section 37D of the Conveyancing Act, 1919–1954, of New South Wales: "(1) No trust shall be held invalid by reason that some "non-charitable and invalid purpose as well as some charitable "purpose is or could be deemed to be included in any of the pur-"poses to or for which an application of the trust funds or any "part thereof is by such trust directed or allowed."

On an originating summons issued by the trustees of the will to have determined the validity of the dispositions in clauses 3 and 5:—

Held, first, that the gift in clause 5 was saved from invalidity by section 37D of the Conveyancing Act. That section applied not only where a testator had expressly indicated alternative purposes, the one charitable and the other non-charitable or not necessarily charitable, but applied also where, as here, the gift was for a purpose described in a composite expression embracing both charitable and non-charitable purposes, for both orders of nuns, the charitable and non-charitable—active and contemplative, the valid and the invalid—were embraced in the single phrase "orders of "nuns."

In re Belcher [1950] V.L.R. 11 overruled.

The section, which applied alike to invalidity due to uncertainty or perpetuity, would apply where the gift was for an object so predominantly charitable—such as an Order of Nuns—that a charitable intention on the part of the testator could be fairly assumed, or for (say) benevolent purposes, which connoted charitable as well as non-charitable purposes. Not every expression, however, which might possibly justify a charitable application was brought within the section.

In re Hollole [1945] V.L.R. 295 approved.

Held, secondly, that there were ample indications in this case to displace the prima facie conclusion that the gift in clause 3 was to the individual members of the selected order of nuns or Christian Brothers at the date of the testator's death so that they could together dispose of it as they thought fit. The dominant and sufficiently expressed intention of the testator was that the gift in the clause was to be an endowment of the order or orders selected to be held as an endowment, and that, as the order or orders were according to their form perpetual the gift must, if it was to a non-charitable order, fail. The gift made by clause 3 was, therefore, valid by reason only of the provisions of section 37D of the Conveyancing Act, and the power of selection given by the clause to the trustees did not extend to Contemplative Orders of Nuns.

Dicta of Lord Buckmaster in *In re Macaulay's Estate* (reported as footnote to *In re Price* [1943] Ch. 422, 435; 59 T.L.R. 367; [1943] 2 All E.R. 505) applied.

Morice v. *Bishop of Durham* (1804) 9 Ves. 399; (1805) 10 Ves. 522; *Cocks* v. *Manners* (1871) L.R. 12 Eq. 574; *In re Ray's Will Trusts* [1936] Ch. 520; 52 T.L.R. 446; *In re Drummond* [1914] 2 Ch. 90; 30 T.L.R. 429, and *In re Cain (Decd.)* [1950] V.L.R. 382 considered.

Judgment of the High Court of Australia varied but affirmed in the result.

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Leahy
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(N.S.W.).

Appeal (No. 28 of 1958), by special leave, from a judgment and order of the High Court of Australia (March 11, 1958) allowing an appeal by the present respondent the Attorney-General for New South Wales from part of a judgment and order and dismissing an appeal by the present appellants from another part of the judgment and order of the Supreme Court of New South Wales in Equity (April 11, 1957) which determined questions raised in an originating summons as to the construction and validity of certain dispositions made by the will of Francis George Leahy.

The following facts are taken from the judgment of the Judicial Committee: The appellants in this case were the widow and children of a wealthy Australian, Francis George Leahy, who died on January 11, 1955. The respondents were the trustees of his will, which was made on February 16, 1954, and Her Majesty's Attorney-General in and for the State of New South Wales.

The questions raised in the appeal concerned the validity of the dispositions made by two clauses of the will which may at once be conveniently referred to and, so far as is necessary, stated verbatim. By his will the testator, after appointing executors and trustees and giving legacies of £1,000 each to the Reverend Mother or person in charge for the time being of St. Joseph's Convent at Bungendore in the State of New South Wales and to the Rector for the time being of the Passionist Fathers, Mary's Mount, Goulburn, with specific directions as to the disposal of such sums, and after making certain dispositions in favour of members of his family which need not be further mentioned, by clause 3 provided as follows: "3. As to my property known as 'Elmslea' situated at Bungendore aforesaid "and the whole of the lands comprising the same and the whole "of the furniture contained in the homestead thereon upon trust "for such order of nuns of the Catholic Church or the Christian "Brothers as my executors and trustees shall select and I again "direct that the selection of the order of nuns or Brothers as "the case may be to benefit under this clause of my will shall "be in the sole and absolute discretion of my said executors and "trustees."

By clause 4 he devised and bequeathed certain other property in New South Wales upon certain trusts and subject to certain conditions in favour of an order of nursing sisters known as "The Nursing Sisters of the Little Company of Mary," and by clause 5 he disposed of the residue of his real and personal property in the following terms: "5. As to all the rest and "residue of my estate both real and personal of whatsoever kind "or nature and wheresoever situated upon trust to use the income as well as the capital to arise from any sale thereof in "the provision of amenities in such convents as my said executors "and trustees shall select either by way of building a new "convent where they think necessary or the alteration of or

"addition to existing buildings occupied as a convent or in the "provision of furnishings in any such convent or convents and "I declare that my said executors and trustees shall have the "sole and absolute discretion of deciding where any such pre-"mises shall be built or altered or repaired and the order or "orders of nuns who shall benefit under the terms of this clause "the receipt of the Reverend Mother for the time being of that "particular order of nuns or convent shall be a sufficient dis-"charge to my said executors and trustees for any payment "under this clause."

Finally, the testator directed that the trustees should be at liberty to sell and dispose of the whole or any part of his real or personal estate as they in their absolute discretion should think fit and in the meantime should have the wide powers of leasing and management therein mentioned.

Questions as to the validity of the dispositions made by clauses 3 and 5 came before the Supreme Court of New South Wales on an originating summons issued by the trustees and it was held by Myers J. (1) that there was no territorial limitation in the will which would restrict the selection by the trustees to Orders in New South Wales or Australia, that once the recipient, whether an Order of Nuns or the Christian Brothers, had been selected the gift was an absolute one to the selected body and that, as there was no uncertainty or perpetuity, the disposition by clause 3 was valid, but (2) that the disposition of residue by clause 5 was invalid in that it involved the devotion of property to purposes not necessarily charitable for a period longer than that permitted by the rule against perpetuities and was not in his opinion saved by section 37D of the Conveyancing Act, 1919–1954.

Upon appeal to the High Court of Australia (Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.) that court (1) affirmed the order of Myers J. in regard to the disposition made by clause 3 holding (by a majority) that an absolute gift was thereby established in favour of the selected beneficiary and (unanimously) that in any case it was saved by section 37D, but (2) allowed the appeal in regard to the disposition made by clause 5 holding (again unanimously) that it was saved from invalidity by the section. From that order the testator's widow and children appealed to Her Majesty in Council.

Section 37D of the Conveyancing Act, 1919–1954, which had been the subject of much judicial discussion, as had its prototype, section 131 of the Property Law Act, 1928, of the State of Victoria, was in the following terms: "(1) No trust shall be "held to be invalid by reason that some non-charitable and "invalid purpose as well as some charitable purpose is or could "be deemed to be included in any of the purposes to or for "which an application of the trust funds or any part thereof "is by such trust directed or allowed.

"(2) Any such trust shall be construed and given effect

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"to in the same manner in all respects as if no application of "the trust funds or of any part thereof to or for any such "non-charitable and invalid purpose had been or could be deemed "to have been so directed or allowed.

"(3) This section shall not apply to any trust declared before "or to the will of any testator dying before the commencement "of the Conveyancing, Trustee and Probate (Amendment) Act, "1938."

1959. January 22, 26, 27, 29. *A. B. Kerrigan Q.C.* and *D. S. Hicks* (both of Australia) for the appellants.

Nigel Bowen (Australia) and *J. G. Le Quesne* for the respondent the Attorney-General for New South Wales.

B. P. MacFarlane Q.C. and *D. G. McGregor* (both of Australia) for the respondent trustees.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Roman Catholic Archbishop of Melbourne* v. *Lawlor*[1]; *Inland Revenue Commissioners* v. *Broadway Cottages Trust*[2]; *In re Coxen*[3]; *In re Dean's Will Trusts*[4]; *In the Will of Forrest*[5]; *In re Griffiths*[6]; *In re Price*[7]; *Union Trustee Co. of Australia Ltd.* v. *Church of England Property Trust, Diocese of Sydney*[8]; *Perpetual Trustee Co. (Ltd.)* v. *King George's Fund for Sailors*[9]; *In re Ingram*[10]; *In re Ashton (Decd.)*[11]; *In re Gillingham Bus Disaster Fund*[12]; *Robert Batcheller & Sons Ltd.* v. *Batcheller*[13]; *De Beauvoir* v. *Welch*[14]; *In re White*[15]; *In re Bond*[16]; *Perpetual Trustee Co. (Ltd.)* v. *Wittscheibe*,[17] and *Lemm* v. *Federal Commissioner of Taxation*.[18]

April 20. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: It will be observed that, in the relevant clauses of the will, the testator referred to "Orders of Nuns." It was, however, held in the High Court of Australia and has not been disputed before their Lordships that this phrase was not used in its strict canonical sense but included also Congregations of Sisters, of which there are a considerable number in Australia. It further appeared that among the Orders represented in Australia are Contemplative Orders. Such Orders are not regarded as charitable in the legal sense of that word.

[1] (1934) 51 C.L.R. 1.
[2] [1955] 1 Ch. 20; [1954] 1 W.L.R. 659; 3 W.L.R. 438; [1954] 1 All E.R. 878; 3 All E.R. 120.
[3] [1948] Ch. 747; [1948] 2 All E.R. 492.
[4] [1950] 1 All E.R. 882.
[5] [1913] V.L.R. 425.
[6] [1926] V.L.R. 212.
[7] (1935) 35 N.S.W.S.R. 444.
[8] (1946) 46 N.S.W.S.R. 298.
[9] (1949) 50 N.S.W.S.R. 145.
[10] [1951] V.L.R. 424.
[11] [1955] N.Z.L.R. 192.
[12] [1958] Ch. 300; [1957] 3 W.L.R. 1069; [1958] 1 All E.R. 37; [1959] Ch. 62; [1958] 3 W.L.R. 325; [1958] 2 All E.R. 749.
[13] [1945] Ch. 169; 61 T.L.R. 233; [1945] 1 All E.R. 522.
[14] (1827) 7 B. & Cr. 266.
[15] [1893] 2 Ch. 41; 9 T.L.R. 32, 261.
[16] [1929] V.L.R. 333.
[17] (1940) 40 N.S.W.S.R. 501.
[18] (1942) 66 C.L.R. 399.

In these circumstances questions arose as to the validity of the dispositions made by clauses 3 and 5. It was conceded that, as the trustees had under clause 5 a power of selection amongst Orders which were charitable and Orders which were not charitable, the disposition of residue was invalid unless it was saved by the provisions of section 37D of the Conveyancing Act, 1919–1954. In regard to clause 3 the position was different. The respondent trustees urged as a second line of defence that the same section saved from invalidity the disposition made by that clause. But this alone was not enough for them; for, even if the plea was successful, it would not enable them to select a Contemplative Order as a beneficiary. Accordingly they urged that clause 3 was in effect an absolute gift to the Order which they might select: if so, no question of invalidity would arise: they would have freedom of choice amongst all Orders including Contemplative Orders.

[His Lordship stated the terms of section 37D of the Conveyancing Act and continued:] The genesis and purpose of this section are clear. As the law stood before its enactment, a gift to such charitable or other purposes as trustees might think fit was void, and this was the law whether the alternative to charitable purposes was the vague and general expression "other "purposes" or a less vague but still indefinite expression such as "benevolent purposes" or even a precisely defined non-charitable institution. Equally the gift was invalid if it was given for a purpose expressed in a compendious phrase which embraced both charitable and non-charitable objects. It was to remedy this state of the law that the section was enacted and their Lordships will observe at once that there is no reason to confine its operation to those cases in which the invalidity of the alternative gift is due to one cause rather than another. The language is clear and admits of no qualification. It applies alike to invalidity due to uncertainty or to perpetuity.

The disposition made by clause 5 will first be considered. A preliminary point can be disposed of. It was argued on behalf of the appellants that the word "amenities" was of such vague and uncertain meaning as to invalidate the whole gift. This argument ignores the fact that the testator in the succeeding sentence of his will explains what he means by "amenities" in language which cannot fairly be challenged on the ground of uncertainty. Their Lordships therefore approach the question of the application of the section upon the footing that the gift would be valid if all convents could be regarded as charitable, but, as they cannot, the section must be invoked to save it. They would only interpolate that upon the question (on which there was a difference of opinion in the courts of Australia) whether the Orders among which the trustees have a power of selection are in any way limited to Orders operating in New South Wales at the date of the death of the testator, they agree with the view expressed by the Chief Justice and McTiernan J.

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that the language of the will does not admit of any territorial limitation being placed upon the Orders which may benefit by the gift. This does not appear to affect in any way the question whether the section is applicable.

The real question can now be stated. It is whether the section only applies where the testator has expressly indicated alternative purposes, the one charitable, the other non-charitable or not necessarily charitable, or applies also where the gift is for a purpose described in a compendious expression which is apt to include both charitable and non-charitable purposes. In the latter case the further question will arise whether the section applies if the area of choice, however wide and indeterminate, admits of a charitable application or whether some specific indication of a charitable intention is demanded—a question of great nicety to which further reference will be made.

Upon the main question their Lordships are in agreement with the unanimous opinion of the judges of the High Court. The trust being declared to be the provision of amenities in convents in such manner as is prescribed with the further direction that the trustees are to have an absolute discretion as to the Order or Orders of Nuns who shall benefit, can it be predicated of it that it would be invalid (but for the section) by reason that some non-charitable and invalid purpose as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed? For the sake of simplicity this may be regarded as a gift for the benefit of such Order of Nuns as the trustees may select. If the testator had expanded these words into "for such Order of Nuns whether "active or contemplative, as my trustees shall select," the gift would, but for the section, have been invalid, but the section would, as counsel for the appellants was constrained to admit, have clearly applied. But the area of selection is the same whether these words are expanded or not. Both Orders, the charitable and non-charitable, both purposes, the valid and the invalid, are embraced in the single phrase "Orders of Nuns." It appears to their Lordships not only that the language of the section upon a reasonable construction covers the case of a composite expression embracing charitable and non-charitable purposes, but that, as the present case forcibly illustrates, a contrary view leads to a result which cannot sensibly have been intended by the legislature. This conclusion accords with the overwhelming weight of authority in the courts of New South Wales and of Victoria and also of New Zealand where a similar Act is in force. The relevant cases are discussed in the several judgments of the High Court of Australia in the case now under appeal. Their Lordships respectfully concur in what is there said. They endorse the view that the judgment in *In re Belcher*[1] cannot

[1] [1950] V.L.R. 11.

be supported. Some reliance was placed by the appellants upon the expression "is or could be deemed to be included," but it is difficult to see how it helps them. On the contrary, as is pointed out by Kitto J., these words seem particularly appropriate to the case of a composite expression. There is no need for them if there is a clear-cut alternative between charitable and non-charitable purposes.

But, though their Lordships are of opinion that the section may operate where there is a composite expression covering charitable and non-charitable purposes, and does so in the present case, it is clear that not every expression which might possibly justify a charitable application is brought within it. For instance, in *In re Hollole* [2] there was a gift to a trustee "to be disposed "of by him as he may deem best." The trustee might presumably have deemed it best to dispose of it for a charitable purpose, and, if he had done so, could not be said to have exceeded his powers. Yet O'Bryan J. held that the gift was not saved by the section, and his decision has been rightly approved in the High Court. This was a clear case because the testator did not designate any purpose at all but in effect delegated his testamentary power in a manner that the law does not permit. Greater difficulty will arise where the permissible objects of choice are described in a composite expression which, though not so vague and general as to amount to a delegation of testamentary power, does not very clearly indicate a charitable intention on the part of the testator. "In the present case," say the Chief Justice and McTiernan J., "there is reference to a "distributable class which, while not exclusively charitable, is "predominantly charitable in character." The same concept appears in a different form in the judgment of Williams J. and Webb J. "One can also agree with him" (i.e., Myers J.) they say "that in order to satisfy the section the application of the "whole fund to charity must be one way of completely satisfying "the intention of the testator. But, if the trust either directs "or allows this to be done, the testator's intention will be com-"pletely satisfied if the trust funds are so applied. . . ." Thus whether the gift be to Orders of Nuns, an object so predominantly charitable that a charitable intention on the part of the testator can fairly be assumed, or for (say) benevolent purposes, which connotes charitable as well as non-charitable purposes, the section will apply. Inevitably there will be marginal cases, where an expression is used which does not significantly indicate a charitable intention, and their Lordships do not propose to catalogue the expressions which will or will not attract the section. It may be sufficient to say that in the chequered history of this branch of the law the misuse of the words "benevolent" and "philanthropic" has more than any other disappointed the charitable intention of benevolent testators and that the section is clearly designed to save such gifts.

[2] [1945] V.L.R. 295.

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The disposition made by clause 3 must now be considered. As has already been pointed out, it will in any case be saved by the section so far as Orders other than Contemplative Orders are concerned, but the trustees are anxious to preserve their right to select such Orders. They can only do so if the gift is what is called an absolute gift to the selected Order, an expression which may require examination.

Upon this question there has been a sharp division of opinion in the High Court. Williams and Webb JJ. agreed with Myers J. that the disposition by clause 3 was valid. They held that it provided for an immediate gift to the particular religious community selected by the trustees and that it was immaterial whether the Order was charitable or not because the gift was not a gift in perpetuity. "It is given" they said (and these are the significant words) "to the individuals comprising the "community selected by the trustees at the date of the death "of the testator. It is given to them for the benefit of the "community." Kitto J. reached the same conclusion. He thought that the selected Order would take the gift immediately and absolutely and could expend immediately the whole of what it received. "There is," he said, "no attempt to create a "perpetual endowment." A different view was taken by the Chief Justice and McTiernan J. After an exhaustive examination of the problem and of the relevant authorities they concluded that the provision made by clause 3 was intended as a trust operating for the furtherance of the purpose of the Order as a body of religious women or, in the case of the Christian Brothers, as a teaching Order. "The membership of any Order chosen," they said, "would be indeterminate and the trust was intended "to apply to those who should become members at any time. "There was no intention to restrain the operation of the trust "to these presently members or to make the alienation of the "property a question for the Governing Body of the Order chosen "or any section or part of that Order." They therefore held that unless the trust could be supported as a charity it must fail.

The brief passages that have been cited from the judgments in the High Court sufficiently indicate the question that must be answered and the difficulty of solving it. It arises out of the artificial and anomalous conception of an unincorporated society which, though it is not a separate entity in law, is yet for many purposes regarded as a continuing entity and, however inaccurately, as something other than an aggregate of its members. In law a gift to such a society simpliciter (i.e., where, to use the words of Lord Parker in *Bowman* v. *Secular Society Ltd.*,[3] neither the circumstances of the gift nor the directions given nor the objects expressed impose on the donee the character of a trustee) is nothing else than a gift to its members at the date of the gift as joint tenants or tenants in common. It is

[3] [1917] A.C. 406, 437; 33 T.L.R. 376.

for this reason that the prudent conveyancer provides that a receipt by the treasurer or other proper officer of the recipient society for a legacy to the society shall be a sufficient discharge to executors. If it were not so, the executors could only get a valid discharge by obtaining a receipt from every member. This must be qualified by saying that by their rules the members might have authorised one of themselves to receive a gift on behalf of them all.

It is in the light of this fundamental proposition that the statements, to which reference has been made, must be examined. What is meant when it is said that a gift is made to the individuals comprising the community and the words are added "it is given to them for the benefit of the community"? If it is a gift to individuals, each of them is entitled to his distributive share (unless he has previously bound himself by the rules of the society that it shall be devoted to some other purpose). It is difficult to see what is added by the words "for the "benefit of the community." If they are intended to import a trust, who are the beneficiaries? If the present members are the beneficiaries, the words add nothing and are meaningless. If some other persons or purposes are intended, the conclusion cannot be avoided that the gift is void. For it is uncertain, and beyond doubt tends to a perpetuity.

The question then appears to be whether, even if the gift to a selected Order of Nuns is prima facie a gift to the individual members of that Order, there are other considerations arising out of the terms of the will, or the nature of the society, its organisation and rules, or the subject-matter of the gift which should lead the court to conclude that, though prima facie the gift is an absolute one (absolute both in quality of estate and in freedom from restriction) to individual nuns, yet it is invalid because it is in the nature of an endowment and tends to a perpetuity or for any other reason. This raises a problem which is not easy to solve, as the divergent opinions in the High Court indicate.

The prima facie validity of such a gift (by which term their Lordships intend a bequest or demise) is a convenient starting point for the examination of the relevant law. For as Lord Tomlin (sitting at first instance in the Chancery Division) said in *In re Ogden*,[4] a gift to a voluntary association of persons for the general purposes of the association is an absolute gift and prima facie a good gift. He was echoing the words of Lord Parker in *Bowman's* case[5] that a gift to an unincorporated association for the attainment of its purposes "may . . . be "upheld as an absolute gift to its members." These words must receive careful consideration, for it is to be noted that it is because the gift can be upheld as a gift to the individual members that it is valid, even though it is given for the general

[4] [1933] Ch. 678; 49 T.L.R. 341. [5] [1917] A.C. 406, 442.

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purposes of the association. If the words "for the general purposes of the association" were held to import a trust, the question would have to be asked, what is the trust and who are the beneficiaries? A gift can be made to persons (including a corporation) but it cannot be made to a purpose or to an object: so also, a trust may be created for the benefit of persons as cestuis que trustent but not for a purpose or object unless the purpose or object be charitable. For a purpose or object cannot sue, but, if it be charitable, the Attorney-General can sue to enforce it. (Upon this point something will be added later.) It is therefore by disregarding the words "for the general purposes of the association" (which are assumed not to be charitable purposes) and treating the gift as an absolute gift to individuals that it can be sustained. The same conclusion had been reached 50 years before in *Cocks* v. *Manners* [6] where a bequest of a share of residue to the "Dominican Convent at Carisbrooke (payable to the Superior for the time being)" was held a valid gift to the individual members of that society. In that case no difficulty was created by the addition of words which might suggest that the community as a whole, not its members individually, should be the beneficiary. So also with *In re Smith.*[7] There the bequest was to "the society or institution known as the "Franciscan Friars of Clevedon County of Somerset" absolutely. Joyce J. had no difficulty in construing this as a gift individually to the small number of persons who had associated themselves together at Clevedon under monastic vows. Greater difficulty must be felt when the gift is in such terms that, though it is clearly not contemplated that the individual members shall divide it amongst themselves, yet it is prima facie a gift to the individuals and, there being nothing in the constitution of the society to prohibit it, they can dispose of it as they think fit. Of this type of case *In re Clarke* [8] may be taken as an example. There the bequest was to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to the Corps. The judge (Byrne J.) was able to uphold this as a valid gift on the ground that all the members of the association could join together to dispose of the funds or the barracks. He assumed (however little the testator may have intended it) that the gift was to the individual members in the name of the society or of the committee of the society. This might be regarded as an extreme case had it not been followed by *In re Drummond.*[9] In that case a testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and to stand possessed of the proceeds upon trust for the Old Bradfordians Club, London (being a club instituted

[6] (1871) L.R. 12 Eq. 574.
[7] [1914] 1 Ch. 937; 30 T.L.R. 411.
[8] [1901] 2 Ch. 110; 17 T.L.R. 479.
[9] [1914] 2 Ch. 90; 49 T.L.R. 429.

by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees. By a codicil the testator declared that he desired that the said moneys should be used by the club for such purpose as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club and to enable the committee, if possible, to acquire premises to be used as a club-house for the use of the members with various other powers, including the founding of scholarships, as the committee for the time being should think best in the interests of the club or the school. Eve J. said that he could not hold, as the result of the will and codicil together, that the residuary gift to the Old Bradfordians Club was a gift to the members individually, but there was in his opinion a trust and there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity. He cited only *In re Clarke*,[10] though other cases had been referred to in argument, and he ignored that Byrne J. had been able to reach his conclusion in that case just because he regarded the gift as a gift to the individual members of the corps who could together dispose of its assets as they thought fit. The judge added that the legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might think fit for the benefit of the class intended. There was therefore a valid gift to the club for such purposes as the committee should determine for the old boys or members of the club. Their Lordships have thought it desirable to state *Drummond's* case[11] at some length both because it provides an interesting contrast to cases that will be referred to later and was itself an authority relied on by Farwell J. in *In re Taylor*[12] and by Cohen J. (as he then was) in *In re Price*.[13] In the former case the judge observed that *In re Clarke*[14] showed that a gift to a fund for a voluntary body of persons may be perfectly valid unless the rules governing that fund or the purpose for which the institution was created prevent the members from dealing with it, both capital and income, in any way they please. It does not appear that he was making any distinction between a gift to a voluntary body of persons and a gift to a fund for such a body. Two other cases had in the meantime been decided to which reference may be made. In *In re Prevost*[15] a testator had devised and bequeathed the whole of his residuary estate to the trustees of the London Library to be held by them upon trust for the general purposes of that institution, including the benefit of the staff. This case, too, came before Eve J., who held that the gift was valid upon the ground that it was a gift

[10] [1901] 2 Ch. 110.
[11] [1914] 2 Ch. 90.
[12] [1940] Ch. 481; 56 T.L.R. 588.
[13] [1943] Ch. 422; 59 T.L.R. 367; [1943] 2 All E.R. 505.
[14] [1901] 2 Ch. 110.
[15] [1930] 2 Ch. 383; 46 T.L.R. 557.

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to the trustees of the library upon trust to be expended in carrying out the objects of the society according to its rules and that, inasmuch as there was nothing in the terms of the gift or in the rules of the library to prevent the expenditure of the corpus of the property, the gift did not fail for perpetuity. Here there was no question of a gift to an unincorporated society which was to be regarded as a gift to its individual members and capable of being dealt with by them as they should think fit. The judge nevertheless regarded it as falling within the class of case of which *Cocks* v. *Manners* [16] was the leading authority. Nearer to *Cocks* v. *Manners* and nearer too to the present case was *In re Ray's Will Trusts*.[17] In that case a testatrix, who was a nun in a convent, by her will gave all her property to the person who at the time of her death should be or should act as the abbess of the convent. The will was attested by two nuns belonging to the convent, one of whom was subsequently elected abbess and held that office at the time of the death of the testatrix. The substantial question was whether the gift was invalidated by section 15 of the Wills Act, 1937, and it was held not to be so invalidated because the gift was not to the abbess personally but in trust for and as an addition to the funds of the community. As to this Clauson J. made the following observations which state the point at issue [18]: "Another perfectly "lawful form of gift would be a gift of a legacy to the controlling "officer of a society in his capacity of officer, to be dealt with "as he would deal with other funds with which, as such officer "of a voluntary society, it would be his duty to deal. Again, "that would be a gift which the court will recognise as a good "gift, subject only to this point, which sometimes causes diffi-"culty, that if the frame of the gift indicates that the legacy "is not to be used at once and immediately for the purposes "of the voluntary society, but is to be set aside and invested "and the income only to be used, the capital being preserved "as an endowment of the voluntary society, the court will not "give effect to the gift because it infringes the rule that no gift "except a charitable gift is to be a perpetuity, and a gift thus "to endow a voluntary society necessarily creates a perpetuity."

The cases that have been referred to (and many others might have been referred to in the courts of Australia, England and Ireland) are all cases in which gifts have been upheld as valid either on the ground that, where a society has been named as legatee, its members could demand that the gift should be dealt with as they should together think fit; or on the ground that a trust had been established (as in *In re Drummond* [19]) which did not create a perpetuity. It will be sufficient to mention one only of the cases in which a different conclusion has been reached, before coming to a recent decision of the House of Lords which

[16] L.R. 12 Eq. 574.
[17] [1936] Ch. 520; 52 T.L.R. 446.
[18] [1936] Ch. 520, 524.
[19] [1914] 2 Ch. 90.

must be regarded as of paramount authority. In *Carne* v. *Long*[20] the testator devised his mansion-house after the death of his wife to the trustees of the Penzance Public Library to hold to them and their successors for ever for the use, benefit, maintenance and support of the said library. It appeared that the library was established and kept on foot by the subscriptions of certain inhabitants of Penzance, that the subscribers were elected by ballot and the library managed by officers chosen from amongst themselves by the subscribers, that the property in the books and everything else belonging to the library was vested in trustees for the subscribers and that it was provided that the institution should not be broken up so long as 10 members remained. It was urged that the gift was to a number of private persons and there were in truth no other beneficiaries. But Campbell L.C. rejected the plea in words which, often though they have been cited, will bear repetition[21]: "If the devise had been in favour "of the existing members of the society, and they had been at "liberty to dispose of the property as they might think fit, then "it might, I think, have been a lawful disposition and not tending "to a perpetuity. But looking to the language of the rules of "this society, it is clear that the library was intended to be a "perpetual institution, and the testator must be presumed to "have known what the regulations were." This was perhaps a clear case where both from the terms of the gift and the nature of the society a perpetuity was indicated.

Their Lordships must now turn to the recent case of *In re Macaulay's Estate, Macaulay* v. *O'Donnell* which appears to be reported only in a footnote to *In re Price*.[22] There the gift was to the Folkestone Lodge of the Theosophical Society absolutely for the maintenance and improvement of the Theosophical Lodge at Folkestone. It was assumed that the donee, "the Lodge," was a body of persons. The decision of the House of Lords in July 1933, to which both Lord Buckmaster and Lord Tomlin were parties, was that the gift was invalid. A portion of Lord Buckmaster's speech may well be quoted. He had previously referred to *In re Drummond*[23] and *Carne* v. *Long*.[24] "A group of "people," he said, "defined and bound together by rules and "called by a distinctive name can be the subject of gift as well "as any individual or incorporated body. The real question is "what is the actual purpose for which the gift is made. There "is no perpetuity if the gift is for the individual members for "their own benefit, but that, I think, is clearly not the meaning "of this gift. Nor again is there a perpetuity if the society is at "liberty in accordance with the terms of the gift to spend both "capital and income as they think fit . . . If the gift is to be for "the endowment of the society to be held as an endowment and "the society is according to its form perpetual, the gift is bad:

[20] (1860) 2 De G.F. & J. 75.
[21] Ibid. 79.
[22] [1943] 1 Ch. 422, 435.
[23] [1914] 2 Ch. 90.
[24] 2 De G.F. & J. 75.

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"but, if the gift is an immediate beneficial legacy, it is good." In the result he held the gift for the maintenance and improvement of the Theosophical Lodge at Folkestone to be invalid. Their Lordships respectfully doubt whether the passage in Lord Buckmaster's speech in which he suggests the alternative ground of validity: viz., that the society is at liberty in accordance with the terms of the gift to spend both capital and income as they think fit, presents a true alternative. It is only because the society, i.e., the individuals constituting it, are the beneficiaries, that they can dispose of the gift. Lord Tomlin came to the same conclusion. He found in the words of the will "for the maintenance and "improvement" a sufficient indication that it was the permanence of the Lodge at Folkestone that the testatrix was seeking to secure and this, he thought, necessarily involved endowment. Therefore a perpetuity was created. A passage from the judgment of Lord Hanworth M.R. (which has been obtained from the records) may usefully be cited. He said: "The problem may "be stated in this way. If the gift is in truth to the present "members of the society described by their society name so that "they have the beneficial use of the property and can, if they "please, alienate and put the proceeds in their own pocket, then "there is a present gift to individuals which is good: but if the "gift is intended for the good not only of the present but of "future members so that the present members are in the position "of trustees and have no right to appropriate the property or its "proceeds for their personal benefit then the gift is invalid. It "may be invalid by reason of there being a trust created, or "it may be by reason of the terms that the period allowed by the "rule against perpetuities would be exceeded."

It is not very clear what is intended by the dichotomy suggested in the last sentence of the citation, but the penultimate sentence goes to the root of the matter. At the risk of repetition their Lordships would point out that, if a gift is made to individuals, whether under their own names or in the name of their society, and the conclusion is reached that they are not intended to take beneficially, then they take as trustees. If so, it must be ascertained who are the beneficiaries. If at the death of the testator the class of beneficiaries is fixed and ascertained or ascertainable within the limit of the rule against perpetuities, all is well. If it is not so fixed and not so ascertainable the trust must fail. Of such a trust no better example could be found than a gift to an Order for the benefit of a community of nuns, once it is established that the community is not confined to living and ascertained persons. A wider question is opened if it appears that the trust is not for persons but for a non-charitable purpose. As has been pointed out, no one can enforce such a trust. What follows? Ex hypothesi the trustees are not themselves the beneficiaries yet the trust fund is in their hands, and they may or may not think fit to carry out their testator's wishes. If so, it would seem that the testator has imperfectly exercised his testamentary

power; he has delegated it, for the disposal of his property lies with them, not with him. Accordingly, the subject-matter of the gift will be undisposed of or fall into the residuary estate as the case may be. Their Lordships do not ignore that from this fundamental rule there has from time to time been a deviation: see, for example, *In re Dean*,[25] *In re Thompson*[26]: and that attempts have been made to explain or justify such cases (see, in particular, the fourth edition of Gray on the Rule against Perpetuities, pp. 776 et seq.). But the rule as stated in *Morice* v. *Bishop of Durham* (*per* Sir William Grant M.R.[27]) (*per* Lord Eldon L.C.[28]) continues to supply the guiding principle. It may be difficult to reconcile this principle with the decision of *Drummond's* case,[29] but the judge did treat that case as governed by *Cocks* v. *Manners*[30] and, if so, must have assumed that when the will trustees had got the trust fund in their hands they could be compelled by the members of the Old Bradfordonians Club or of the school to apply it as they thought fit. But it is difficult to see how he made such an assumption or arrived at the conclusion that no perpetuity had been created. No similar difficulty arises in regard to the observations of Lord Buckmaster and Lord Tomlin which have already been cited. The effect is the same, whether the gift is to A, B and C or to a society consisting of A, B and C and no others, upon such terms that they can spend both capital and income as they think fit.

It is significant of the fine distinctions that are made in these cases that in *In re Price*[31] the judge, to whose attention *Macaulay* v. *O'Donnell*[32] had been called, held that a gift of a share of residue to the Anthroposophical Society in Great Britain "to be "used at the discretion of the Chairman and Executive Council of "the Society for carrying on the teachings of the founder, Dr. "Rudolf Steiner," was a valid gift.

Before turning once more and finally to the terms of the present gift, their Lordships must mention the case of *In re Cain* (*Decd.*).[33] In that case Dean J. has made an exhaustive examination of the relevant case law which must prove of great value in similar cases.

It must now be asked, then, whether in the present case there are sufficient indications to displace the prima facie conclusion that the gift made by clause 3 of the will is to the individual members of the selected Order of Nuns at the date of the testator's death so that they can together dispose of it as they think fit. It appears to their Lordships that such indications are ample.

In the first place, it is not altogether irrelevant that the gift is in terms upon trust for a selected Order. It is true that this can in law be regarded as a trust in favour of each and every

[25] (1889) 41 Ch.D. 552; 5 T.L.R. 404.
[26] [1934] Ch. 342.
[27] (1804) 9 Ves. 399.
[28] (1805) 10 Ves. 522.
[29] [1914] 2 Ch. 90.
[30] L.R. 12 Eq. 574.
[31] [1943] 1 Ch. 422.
[32] [1943] 1 Ch. 435.
[33] [1950] V.L.R. 382.

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member of the Order. But at least the form of the gift is not to the members, and it may be questioned whether the testator understood the niceties of the law. In the second place, the members of the selected Order may be numerous, very numerous perhaps, and they may be spread over the world. If the gift is to the individuals it is to all the members who were living at the death of the testator, but only to them. It is not easy to believe that the testator intended an "immediate beneficial legacy" (to use the words of Lord Buckmaster) to such a body of beneficiaries. In the third place, the subject-matter of the gift cannot be ignored. It appears from the evidence filed in the suit that Elmslea is a grazing property of about 730 acres, with a furnished homestead containing 20 rooms and a number of outbuildings. With the greatest respect to those judges who have taken a different view, their Lordships do not find it possible to regard all the individual members of an Order as intended to become the beneficial owners of such a property. Little or no evidence has been given about the organisation and rules of the several Orders, but it is at least permissible to doubt whether it is a common feature of them, that all their members regard themselves or are to be regarded as having the capacity of (say) the Corps of Commissionaires (see *In re Clarke* [34]) to put an end to their association and distribute its assets. On the contrary, it seems reasonably clear that, however little the testator understood the effect in law of a gift to an unincorporated body of persons by their society name, his intention was to create a trust, not merely for the benefit of the existing members of the selected Order, but for its benefit as a continuing society and for the furtherance of its work.

Different views have been held upon the question whether the legal title remains in the will trustees after they have selected an Order. Kitto J. (expressly) and Williams and Webb JJ. (by implication) held that "when a body is selected by the trustees "the property will be at home" and will vest presumably in some authorised person or persons. (The Roman Catholic Charities Land Act of 1942 was not invoked in the High Court and becomes irrelevant if the chosen Order is not a charity.) The Chief Justice and McTiernan J. were of opinion that the trustees were intended, subject to the power of sale, to remain the repository of the whole legal title and to administer the trust by affording the enjoyment to the selected Order. The latter view is attractive if only because of the difficulty of transferring title when the above-mentioned Act does not apply. But their Lordships do not think it necessary for the purpose of this case to decide the question. No difficulty will arise if only a charitable body can be selected. If the choice is wider, the question will not arise. The dominant and sufficiently expressed intention of the

[34] [1901] 2 Ch. 110.

testator is in their opinion (again in the words of Lord Buckmaster) that "the gift is to be an endowment of the society to be "held as an endowment," and that "as the society is according "to its form perpetual" the gift must, if it is to a non-charitable body, fail.

Their Lordships, therefore, humbly advise Her Majesty that the appeal should be dismissed, but that the gift made by clause 3 of the will is valid by reason only of the provisions of section 37 (D) of the Conveyancing Act, 1919–1954, and that the power of selection thereby given to the trustees does not extend to Contemplative Orders of Nuns. The costs of all parties will be paid out of the estate of the testator. The costs of all the respondents will be taxed as between solicitor and clients.

Solicitors: *Waterhouse & Co.; Light & Fulton; Bell, Brodrick & Gray.*

C. C.

[QUEEN'S BENCH DIVISION.]

CATER *v.* ESSEX COUNTY COUNCIL.

1959
April 14.

Lord Parker C.J., Donovan and Salmon JJ.

Town and Country Planning—Enforcement notice—Form—Validity—Notice reciting development without permission—Whether permission under Order of 1950, *permission under Part III of Act of* 1947*—Whether enforcement notice valid—Town and Country Planning General Development Order,* 1950 (*S.I.* 1950, *No.* 728), *art.* 3 (1), *Sch. I, class IV,* 2*—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 12, 13 (1), 23 (1).

The appellant was the owner of land which, prior to 1954, was used as a smallholding. In 1954 he allowed caravans to park on the land. Planning permission for a caravan site having been refused and an appeal to the Minister dismissed, the local planning authority on December 12, 1956, served an enforcement notice on the appellant which recited that "whereas . . . development consisting "of a material change of use has been carried out . . . without "the grant of permission required in that behalf under Part III "of [the Town and Country Planning Act, 1947], the said land "being used for the purpose of a caravan site," and required the appellant within three months "to discontinue the use of the said "land comprising the said development and to restore the said land "to its condition before the development took place." The number of caravans on the land were not reduced and finally the local planning authority charged the appellant with using the land for the purpose of a caravan site in contravention of an enforcement notice which required such use to be discontinued. The justices found the offence proved. On appeal:—

Held, that in a case where the Town and Country Planning General Development Order, 1950, applied by the First Schedule, Class IV, 2, to permit "the use of land . . . for any purpose on not "more than 28 days in total in any calendar year," there had been

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a grant of permission required in that behalf under Part III of the Act of 1947, within section 23 (1) of the Act; that, accordingly, in the present case, the recital in the enforcement notice that development of the land as a caravan site had been carried out without the grant of permission was not true in fact; and that, therefore, the notice was a nullity.

Francis v. *Yiewsley and West Drayton Urban District Council* [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529 applied.

CASE STATED by Essex Justices sitting at Romford.

The appellant, John Cater, was charged on an information dated May 1, 1958, and preferred by the Essex County Council, that on April 14, 1958, at Romford without the grant of permission in that behalf under Part III of the Town and Country Planning Act, 1947,[1] he used certain land at Cummings Hall Farm, Bear Lane, Romford, for the purpose of a caravan site in contravention of an enforcement notice dated December 12, 1956, which required such use to be discontinued, contrary to section 24 of the Act of 1947.

The following facts were admitted or proved before the justices. An enforcement notice dated December 12, 1956, and addressed to the appellant, was served on the appellant on December 13, and read as follows: "Whereas the County Coun-"cil of Essex (hereinafter referred to as 'the county council') "are the local planning authority under the Town and Country "Planning Act, 1947 (hereinafter referred to as 'the Act') for "the administrative county of Essex. And whereas it appears "to the county council that development consisting of a material "change of use has been carried out on the land described in "the schedule hereto without the grant of permission required "in that behalf under Part III of the Act, the said land being "used for the purpose of a caravan site. And whereas you are "the owner and occupier of the said land take notice therefore: "(1) That you are hereby required within three calendar months "from the date on which this notice takes effect to discontinue "the use of the said land comprising the said development and "to restore the said land to its condition before the said develop-"ment took place such restoration to be carried out to the "satisfaction of the county planning adviser. (2) That if after "the period specified in (1) above you use the said land or cause "or permit the said land to be used for the purpose specified "above without the grant of permission in that behalf under "Part III of the Act you will be guilty of an offence and liable "on summary conviction to a fine not exceeding £50; and if you

[1] Town and Country Planning Act, 1947, s. 23 (1): "If it appears "to the local planning authority that "any development of land has been "carried out after the appointed day "without the grant of permission re-"quired in that behalf under this "Part of this Act, . . . the local "planning authority may within four "years of such development being "carried out, . . . serve on the owner "and occupier of the land a notice "under this section."

"continue such use or cause or permit such use to be continued "after the conviction you will be guilty of a further offence and "liable on summary conviction to a fine not exceeding £20 for "every day on which the said use is so continued. This notice "shall take effect at the expiration of a period of 28 days after "the service thereof upon you, subject to the provisions of "subsections (3) and (4) of section 23 of the Act. . . ." The schedule specified the land situate at Cummings Hall Farm. The land to which the enforcement notice related was about 6·7 acres in extent and the appellant was at all material times the owner of the land and the person responsible for its use. The land was formerly used as a smallholding without success and in 1954 it began to be used for parking caravans. The number on the land increased to about 90 caravans and on January 21, 1955, planning permission for use as a caravan site was refused by the county council. In May 1956 a local inquiry was held by an inspector appointed by the Minister of Housing and Local Government on the appellant's appeal against the refusal. By a letter dated July 19, 1956, the Minister dismissed the appeal but stated that he had much sympathy with the caravan occupiers and he relied on the county council to give full weight to the need to avoid hardship in pursuing any enforcement action. The Romford Borough Council supported the appellant at the local inquiry. The land was surrounded by trees and screened from view. There were good facilities provided and the site was accepted as a well-run caravan site by one of the planning assistants who gave evidence for the county council. Between 200 and 250 persons lived in the caravans and the planning assistant stated that he knew of no other accommodation available for them in the area nor of any other place to which the caravans could be moved. By a letter dated December 12, 1956, the county council informed the appellant that provided he took steps to have the caravans removed progressively over the next three years, to the county council's satisfaction, they would not prosecute him for failure to comply with the notice within the time specified therein. On March 11, 1958, the clerk to the county council wrote to the appellant stating that he had failed to reduce the caravans to any extent, and had admitted additional caravans to the site, and that if the number of caravans on the site exceeded 56 by April 14, 1958, the appellant would have failed to comply with the terms of the council's offer and their instruction to prosecute would be carried out. There were at the date of service of the enforcement notice approximately 100 caravans on the land and that number with small fluctuations remained up to the time of the hearing of the information.

It was contended by the appellant that the facts alleged and proved did not amount to a breach of the enforcement notice; that the prosecution was out of time; that the enforcement notice was bad in that it did not comply with section 23 of the Town and Country Planning Act, 1947. The notice failed to specify

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the development as required by that section; it made no allegation of the manner in which the use of the land was said to have been changed; and it made no allegation of the date on which any such change occurred; that the enforcement notice was bad in that it alleged that development consisting of a material change of use had been carried out without the grant of the requisite permission, whereas in fact permission for the alleged change of use was granted by the Town and Country Planning General Development Order, 1950,[2] article 3 and the First Schedule, Class IV, 2.

The magistrates did not require the county council to argue on any of those submissions and were of opinion that the enforcement notice was valid, that the facts proved amounted to a breach of the notice and that the prosecution was in time. They fined the appellant £20.

The appellant appealed.

R. E. Megarry Q.C. and *R. Higgins* for the appellant.

F. H. Lawton Q.C. and *John Marriage* for the county council.

In addition to the cases referred to in the judgment, *Postill* v. *East Riding County Council*[3] was cited in argument.

LORD PARKER C.J. This is another of the many difficult cases which have arisen in regard to an enforcement notice under section 23 of the Town and Country Planning Act, 1947. The matter comes before the court by way of case stated by justices for the petty sessional division of Romford, before whom the appellant was charged that on April 14, 1958, at Romford, "without the grant of permission in that behalf under Part III of "the Town and Country Planning Act, 1947, used certain land "at Cummings Hall Farm, Bear Lane, Romford, for the purpose "of a caravan site in contravention of an enforcement notice "dated December 12, 1956, which required such use to be discontinued, contrary to section 24 of the Town and Country "Planning Act, 1947."

The justices were faced with a number of technical points which were taken by the appellant, who was the party charged, and one has very great sympathy with them when, all the merits being with the respondents, the Essex County Council, they thought nothing of the points raised, and indeed did not require

[2] Town and Country Planning General Development Order, 1950, art. 3 (1): ". . . development of any "class specified in the First Schedule "to this Order is permitted by this "Order and may be undertaken . . . "without the permission of the local "planning authority or the Minister. . . ."

Sch. I: "The following development is permitted under Article 3 "of this Order. . . . Class IV, 2. "The use of land . . . for any purpose "on not more than 28 days in total "in any calendar year, and the erection or placing of movable structures on the land for the purposes "of that use."

[3] [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685.

the county council to argue upon them. They accordingly found the offence proved and fined the appellant £20.

The short facts giving rise to the matter were these: The appellant was at all material times the owner of a little over six acres of land which apparently, prior to 1954, were used as a smallholding. In 1954 he allowed caravans to be parked on the land, and by January 21, 1955, the number had increased to about 90 caravans. Application was made to the local planning authority for planning permission and it was refused. There was an appeal to the Minister, a local inquiry was held, and in due course on July 19, 1956, the Minister gave his decision, which, quite shortly, was to the effect that he had decided that the appeal must be dismissed, but that: "While he deprecates the "bringing of this camp into use without planning permission, he "has much sympathy with the caravan occupiers and he relies "on the county council to give full weight to the need to avoid "hardship in pursuing any enforcement action they may see fit "to take."

Thereupon, on December 12, 1956, the county council served an enforcement notice on the appellant requiring him within three calendar months of the date when the notice was to take effect "to discontinue the use of the said land comprising the said "development and to restore the said land to its condition before "the said development took place such restoration to be carried "out to the satisfaction of the county planning adviser." I must refer in due course in more detail to the enforcement notice. That enforcement notice was enclosed in a letter of the same date in which the county council, in giving effect to the hopes expressed by the Minister, informed the appellant that they would not prosecute provided, to put it generally, he took steps to gradually reduce the number of caravans and, ultimately, in three years, to discontinue the use. However, by March 11, 1958, the county council were not satisfied that the appellant was complying with that offer; indeed, it appeared that there were then over 100 caravans still on the site, and so they wrote to the appellant again and, in effect, said that if the number of caravans was not substantially reduced, in fact to some 56 in number by April 14, 1958, they would prosecute. In due course, the appellant having taken no steps in the matter, this information was laid. Pausing there, I should have thought the merits were wholly with the county council. The appellant has flagrantly avoided compliance with the intentions of the planning authority and the Minister, but a number of technical points have been raised, and whether technical or not, if they are good points, the appellant is entitled to succeed.

The prosecution here was under section 24 of the Act of 1947, subsection (3) of which provides: "Where, by virtue of an "enforcement notice, any use of land is required to be discon-"tinued, or any conditions are required to be complied with in

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"respect of any use of land or in respect of the carrying out of "any operations thereon, then if any person, without the grant "of permission in that behalf under this Part of this Act, uses "the land or causes or permits the land to be used, or carries "out or causes or permits to be carried out those operations, in "contravention of the notice, he shall be guilty of an offence and "liable on summary conviction to a fine . . . " Be it observed that it is a condition precedent that there should be an enforcement notice and, of course, a valid enforcement notice.

Mr. Megarry, on the appellant's behalf, takes first and foremost the point that this was not a valid enforcement notice in that what I may call the factual basis of it was incorrect, and he refers to the decision of the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council.*[1] It is unnecessary to refer to the details of that case. In that case, however, the enforcement notice had recited that the land was developed by the placing thereon of caravans without the grant of the planning permission required. In fact, although when the development by the placing of caravans on the site first took place there was no permission, there had been later, pursuant to section 18 of the Act, what I may call a retrospective permission by the Minister which was to be for a period of six months. The Court of Appeal held that in those circumstances the recital in the enforcement notice was wrong in that permission had been obtained, albeit retrospectively, and they went on further to hold—and that is the important point of the decision from the point of view of the present case—that the recital being wrong the whole enforcement notice was a nullity.

In the present case Mr. Megarry points to the fact that under the Town and Country Planning General Development Order, 1950, the following development is permitted by the First Schedule, Class IV, paragraph 2: "The use of land . . . for any "purpose on not more than 28 days in total in any calendar "year, and the erection or placing of movable structures on the "land for the purposes of that use." Accordingly, says Mr. Megarry, this is really an a fortiori case in the light of *Francis* v. *Yiewsley and West Drayton Urban District Council*[2] in that on the first day when caravans were brought on to the site there was certainly then a change of use and therefore a development, and there existed permission pursuant to that General Development Order. The enforcement notice recites: "Whereas it appears to "the county council that development consisting of a material "change of use has been carried out on the land described in the "Schedule hereto without the grant of permission required in that "behalf under Part III of the Act, the said land being used for "the purpose of a caravan site." Accordingly, says Mr. Megarry, when that development first took place, when caravans were first

[1] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

[2] Ibid.

brought on to this site, there was, in fact, permission under Part III of this Act in that the General Development Order made, as I shall refer in a moment under section 13 of the Act, had permitted that development.

In order to test the validity of that argument, it is necessary to look at a few of the sections of the Act itself. Part III, which is the relevant Part, commences with section 12 which, so far as is material, provides: "(1) Subject to the provisions of this section "and to the following provisions of this Act, permission shall be "required under this Part of this Act in respect of any develop- "ment of land which is carried out after the appointed day. (2) In "this Act, except where the context otherwise requires, the "expression 'development' means the carrying out of building, "engineering, mining and other operations in, on, over or under "land, or the making of any material change in the use of any "buildings or other land: . . ." The subsection then goes on, by a series of paragraphs in a proviso to provide that certain changes of use of land shall not be deemed to be development at all. Then, by subsection (5), certain other development is referred to which, though deemed to be development, shall not be development for which permission is required. Section 13 (1) provides: "The Minister shall by order provide for the grant of permission "for the development of land under this Part of this Act, and "such permission may be granted—(*a*) in the case of any develop- "ment specified in any such order, or in the case of development "of any class so specified, by that order itself; (*b*) in any other "case, by the local planning authority (or, in the cases herein- "after provided, by the Minister) on an application in that behalf "made to the local planning authority in accordance with the "provisions of the order." Accordingly, it will be seen that the scheme of the Act was first, to exclude certain types of development by saying they shall not be development at all; secondly, to set up a second category of development which, though it remain development under the Act, shall not require permission; and thirdly, to provide that in all other cases permission is required and may be granted either by a development order specifying any classes of development and, in other cases by what one might call the ordinary applications to the local planning authority and, through the planning authority to the Minister for permission to develop. Observe that in the passage I have read in section 13 it is saying that permission "may be granted," and if one looks further on in that same section there is a constant reference to that. Thus, in subsection (2) it is provided: "An order under "subsection (1) of this section . . . may be made either as a "general order applicable . . . to all land, or as a special order "applicable only to such land as may be so specified, and the "permission granted by any such order may be granted either "unconditionally or subject to such conditions or limitations as "may be so specified." Accordingly, again that provision in

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referring, as it does, to the general order as well as the special order is speaking of permission being thereby granted; indeed, in subsection (3) and subsection (4) there are phrases to the same effect. Therefore, it seems to me clear that a permission which appears by reason of inclusion in the First Schedule to the General Development Order of 1950 is not an exception from the obtaining of permission, but is itself the grant of permission. Accordingly, I think, and indeed I think Mr. Lawton would concede, that on a literal interpretation of those sections the use of the land for 28 days as a caravan site was a permission granted under Part III of the Act.

When one gets to section 23, which is providing for the enforcement notice, it provides: "(1) If it appears to the local "planning authority that any development of land has been "carried out after the appointed day without the grant of permis-"sion required in that behalf under this Part of this Act, or that "any conditions subject to which such permission was granted "in respect of any development have not been complied with" the authority may, within four years of such development being carried out, serve on the owner and occupier an enforcement notice. Accordingly, it seems to me clear that in a case where the General Development Order applies, there has been the grant of permission required in that behalf under this Part of this Act, and if that be right the recital in the enforcement notice in the present case is not true in fact. Its basis is inaccurate, and on the authority of the Court of Appeal in *Francis* v. *Yiewsley and West Drayton Urban District Council*[3] the enforcement notice is a nullity.

As I have said, it is a point of no merit. Certainly nobody was deceived, least of all the appellant, as to what he was being required to do, but these provisions are provisions which have to be strictly complied with. As Lord Simonds said in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[4]: "It was, in "the first place, contended that the Act was highly technical and, "as it encroached on private rights, the court must insist on "strict and rigid adherence to formalities. This, as a general "proposition, commands assent, and not the less because dis-"regard of an enforcement notice is an offence involving suffici-"ently serious penal consequences."

It is said on the other side that the court should not give the literal interpretation to the words in the various sections to which I have referred, in that to do so would really drive a coach-and-four through the powers of local authorities in regard to enforcement notices. It is said that, unless the permission for the temporary user for 28 days is treated as a conditional permission it would be quite impossible to frame an enforcement notice which was valid, and arguments have been addressed to the court to

[3] [1958] 1 Q.B. 478.

[4] [1957] A.C. 223, 233; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

suggest that the permission for the 28-day user is not a conditional permission at all. I do not propose in the present case to decide what the effect of that provision is, whether it can be said that it is merely a description of a limited development or whether it is a development with an implied condition that it shall cease at the end of 28 days. I find it unnecessary to decide that because, even if it is not a condition—and I think I suggested in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[5] that this or similar permission might be conditional—even if I were quite wrong in that, I cannot think that this is a case where the court in effect is entitled to rewrite an Act of Parliament. It is not merely a case where the insertion of a word by necessary implication will cure the mischief. It is not a case, as sometimes happens, where the court is constrained to use the word "or" and make it conjunctive or anything like that. It is a matter of rewriting a considerable number of sections in an Act of Parliament. Lord Simonds in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*[6] gave a sharp reminder of the dangers of a court usurping the powers of the legislature. I need not refer to the passages because they are well known. I feel that the words in the Act are so clear that whatever their effect may be in the end this court must give effect to them.

I should add that two other points were taken which, if valid, would not necessitate what I may call the rewriting of the Act at all. It is said, first, that in section 12 (2) there is a definition of "development" which is the meaning in the Act except where the context otherwise requires. It has been said that when one comes to section 23 (1) it might be possible to read "develop-"ment" there as meaning something different, in particular, as applying to a continued use of a permitted use after the permission had expired. I find it impossible to say that there is any context in section 23 which requires such an interpretation. Certainly the context of the General Development Order of 1950 itself cannot be imported. The most that could be said would be that section 13 has intervened between section 12 and section 23, but there is nothing in section 13 which would suggest that a temporary user for 28 days, such as we are considering here, was going to be a matter for a General Development Order.

Secondly, it has been suggested that it might be possible to read "permission required" in section 23 as referring only to the permission required in the ordinary sense, namely, by applications made to the local authority and through the local authority to the Minister, and that in this context "permission required" does not refer to a general permission, if one may use that phrase, as under the General Development Order of 1950. Again, I find it quite impossible under the scheme in this Act to which I have referred to say that "permission required" in section 23 is

[5] [1958] 1 Q.B. 478, 493.

[6] [1952] A.C. 189, 191; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

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limited in that way. In particular, I think it is relevant to observe that section 13 deals in one and the same section and in one and the same subsection with permissions which may be granted whether it be on an application to the local authority in individual cases or whether by means of a general or special order. In my judgment, sorry as I am to come to that conclusion, I fear that the technical point succeeds and that this appeal must be allowed.

I would only add that Mr. Megarry took several other points as to the validity of the enforcement notice, and he further contended that the prosecution was too late in point of time. In view of the opinion at which I have arrived on his main point, I find it unnecessary to deal with his other points, and I do not propose to do so.

DONOVAN J. I feel bound, and with the like reluctance, to agree. The construction which this court is now putting upon the words in section 23 (1) of the Act of 1947 "permission required "in that behalf under this Part of this Act," namely, that such permission is given, inter alia, by the General Development Order of 1950 granting 28 days' permission, is a construction which will make the enforcement of planning control even more difficult than it is already, and perhaps in a large number of cases impossible. For that reason I have sought a construction of the words which would avoid the result which I do not think Parliament could ever have intended. In this search I have failed. I think the words themselves are clear, and it is not necessarily the case that the purpose of the Act will be completely defeated if the words are given their ordinary meaning.

In these circumstances, I agree that the modifications in the language of sections 12, 23 and 24 of the Act of 1947 which would be required to defeat the appellant's argument here are not, as a matter of construction, justified. Furthermore, I think that the difficulty can probably be cured by a simple amendment, for example, of sections 23 and 24 of the Act to the effect that in the application of those sections any permission granted under paragraph 2 of class 4 of the First Schedule to the General Development Order of 1950 should be disregarded.

SALMON J. I agree.

Appeal allowed.

Solicitors: *James & Charles Dodd; Sharpe, Pritchard & Co. for the Solicitor, Essex County Council.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

R. & T. GLYNN EVANS AND OTHERS v. LIVERPOOL CORPORATION.

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April 22, 23.

Lord Parker C.J., Donovan and Salmon JJ.

Highway—Private street works—Abandonment of resolution to make up road—Whether later resolution valid—No notice of abandonment of prior resolution—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 7, 8, 11.

In September, 1931, an urban authority resolved, pursuant to section 6 of the Private Street Works Act, 1892, to make up a road. The formalities required in connection with publication of the resolution were complied with, and within the prescribed period objections were lodged on behalf of most of the frontagers. The authority took no steps to have those objections determined by a court of summary jurisdiction nor did they proceed with their proposal to make up the road. In April, 1948, the authority again resolved, pursuant to section 6, to make up the same road, the resolution containing no reference to the resolution of 1931. The resolution was duly published and within the prescribed period objections were lodged by certain of the frontagers. No steps were taken to have these objections determined, but on January 2, 1952, the authority resolved, pursuant to section 11 of the Act, to amend the estimate and the provisional apportionment of the probable expenses of making up the road. Objections were lodged by a number of frontagers, which objections the authority sought to have determined by a court of summary jurisdiction on May 9, 1958. At the hearing of the application the frontagers contended, inter alia, that in the circumstances the authority must be deemed to have abandoned the resolution of 1931 and could no longer seek to apportion the expense of the works amongst the frontagers; alternatively, that the resolution of 1931 was still in being and that, therefore, the resolutions of 1948 and 1952 were null and void. The magistrate considered that those resolutions were valid and dismissed the objections. On appeal:—

Held, (1) that abandonment of a resolution to make up a road under section 6 of the Act of 1892 did not preclude an urban authority from passing a further resolution to make up the same road in the future, for section 6 gave the authority an express power "from time to time" to resolve to make up a road and the Act contemplated that it should do so whenever public convenience and safety demanded.

(2) That the authority had in fact abandoned the resolution of 1931 and it was immaterial that the objections to that resolution had not been determined and that notice of abandonment was not given; accordingly the resolution of 1948 and the amending resolution of 1952 were valid and the frontagers were bound to pay the cost of making up the road.

Southampton Corporation v. *Lord* (1903) 67 J.P. 189; 1 L.G.R. 324, and *Faulkner* v. *Hythe Corporation* [1927] 1 K.B. 532; 43 T.L.R. 55 considered.

CASE STATED by the Liverpool stipendiary magistrate.

On May 9, 1958, there came before the magistrate an application by the respondents, the Liverpool Corporation, pursuant to the provisions of the Private Street Works Act, 1892, for the

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determination of objections lodged to proposals made under that Act by the corporation.

The following were among the facts proved or admitted before the magistrate. On September 17, 1931, the corporation resolved, pursuant to the provisions of section 6 of the Private Street Works Act, 1892,[1] to make up the roadway known as Leinster Road in the

[1] Private Street Works Act, 1892, s. 6: "(1) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works) . . . and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street . . . (2) The surveyor shall prepare . . . (*a*) A specification of the private streets works referred to in the resolution . . . (*b*) An estimate of the probable expenses of the works; (*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith . . . Such specification, plans, sections, estimate and provisional apportionment . . . shall be submitted to the urban authority, who may by resolution approve the same . . . The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in . . . this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication. During one month from the date of the first publication the approved specifications, plans and sections (if any), estimates, and provisional apportionments . . . shall be kept deposited at the urban authority offices, and shall be open to inspection. . . ."

S. 7: "During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals . . . on any of the following grounds . . . (*d*) That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive . . ."

S. 8: "(1) The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given."

S. 11: "The urban authority may from time to time amend the specifications, plans, and sections (if any), estimates, and provisional apportionments for any private street works, but if the total amount of the estimate . . . is increased, such estimate and the provisional apportionment shall be published in the manner prescribed in . . . this Act, and shall be open to inspection at the urban authority offices at all reasonable times, and copies thereof shall be served on the owners of the premises affected thereby; and objections may be made to the increase and apportionment, and if made shall be dealt with and determined in like manner as objections to the original estimate and apportionment."

City of Liverpool. The formalities required in connection with the publication of the resolution were duly complied with, and within the prescribed statutory period objections were lodged on behalf of all the frontagers of Leinster Road (save for frontagers occupying certain odd-numbered dwelling-houses). The corporation took no steps to have those objections determined by a court of summary jurisdiction pursuant to the provisions of the Act, nor did they proceed with their proposal to carry out the work of making up the road.

On April 7, 1948, the corporation resolved pursuant to the provisions of the Act to make up Leinster Road. That resolution bore no reference to the resolution of September, 1931. The formalities required in connection with the publication of the resolution were duly complied with, and within the prescribed statutory period an objection was lodged by one of the present appellants on behalf of certain owners of odd-numbered properties. No steps were taken by the corporation to have the 1948 objections determined by a court of summary jurisdiction pursuant to the provisions of the Act.

On January 2, 1952, the corporation resolved, pursuant to section 11 of the Act, to amend the estimate of the probable expenses of the work of making up the road and the provisional apportionment of such expenses among the premises to be charged therewith. The formalities required in connection with the publication of this amending resolution were duly complied with, and within the prescribed statutory period objections were lodged by the appellants in respect of a number of dwelling-houses in the road, which objections were the subject-matter of the application by the corporation.

There was annexed to the case a table showing in respect of each of the resolutions particulars of the objections lodged on behalf of the respective owners and by whom they were so lodged as follows (see pp. 752, 753).

There was also annexed to the case a bundle of documents and correspondence among which was a letter dated August 22, 1957, written by the corporation's town clerk to the agents of one of the objectors, containing the following passage: "Notices "under the [Private Street Works Act, 1892] were served upon "the frontagers first in 1931. A majority of owners then ob- "jected to the proposal and the City Council decided accordingly "to defer indefinitely the proposal to carry out the work. After "the war, a fresh scheme was prepared and the statutory notices "under the above Act relating thereto, were served upon the "owners concerned on April 13, 1948. Objections to this new "proposal were made by certain owners and the work could not "be commenced."

On behalf of the frontagers it was contended that as the corporation had taken no steps to have the objections lodged to their resolution of September 17, 1931, determined by a court of

No.	1931		1948		1952	
	Objector	Particulars of Objection	Objector	Particulars of Objection	Objector	Particulars of Objection
Vacant land—Martins Bank	C. Williams & Sutcliffe, . . . agents for owner	The proposed works are unreasonable. The estimated expenses are excessive.	—	—	—	—
1–3 7–19	—	—	—	—	C. H. Edwards & Co., . . . agent for owner	Object to the increased cost being apportioned on the frontagers.
2–20	H. H. & J. Robinson, . . . agent for owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	H. H. & J. Robinson, . . . agent for owner	2, 4, 6, 12, 18 & 20. "There "had been some material in-"formality defect or error" in the inclusion of additional gullies for surface water drainage in the . . . proposals.
1–37 22–38	Daniel L. Evans, Esq., owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	—	—
39–55	—	—	R. & T. Glynn Evans, . . . agent for owner	Expenditure contrary to government policy. Exec. of the work is unnecessary. The cost to the landlord is unreasonable. The proposed action is unfair and unreasonable.	R. & T. Glynn Evans, . . . agent for owner	Notice is invalid. Amended estimate is excessive and unreasonable. Amended provisional apportionment is unfair and unreasonable. Whole intention of the notices is unfair and unreasonable.

No.	1931		1948		1952	
	Objector	Particulars of Objection	Objector	Particulars of Objection	Objector	Particulars of Objection
40–48	Mrs. Sophia Clarke, owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	—	—
52–54 & 58–74	F. M. Raine, . . . agent for owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	Thomas & Jones, . . . agent for owner	Point out they raised no objection in 1948 and object now to paying the increased assessment.
57–63 67–73	C. B. Collinson & Sons, . . . agent for owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	C. B. Collinson & Sons, . . . agent for owner	Point out the increased prices given in 1948, and object to paying the increases.
65	George Lewis, Esq., owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	—	—

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summary jurisdiction the corporation must be deemed to have abandoned their proposal, so that they could no longer seek to apportion the expense of making up the road among the frontagers and the court thereby had no jurisdiction to determine the proposal before it on May 9, 1958; alternatively, that if it were found that the corporation had not abandoned the 1931 proposal but had indefinitely deferred it, they were under a duty to give public notice of such deferment and that their failure so to do deprived them of the right to utilise the provisions of the Act of 1948 and/or deprived the court of jurisdiction to determine the proposal; that the corporation were under a duty upon objections being properly lodged pursuant to the provisions of the Act of 1892 to apply to a court of summary jurisdiction to appoint a time for the determination of those objections; alternatively, that the proceedings in respect of the 1948 proposals were null and void and of no legal effect in that, the 1931 proposal being still in existence at the date of the 1948 proposal, the proceedings by the corporation in 1948 should have been by way of an amending resolution and an amended estimate in accordance with section 11 of the Act and, further, that by reason thereof the steps taken by the corporation in 1952 were also null and void and of no legal effect; and that in any event it was unjust, unreasonable and inequitable that the frontagers should be called upon to pay any sum greater than the estimated amounts to be paid by them in 1948, for such increase in the costs as had taken place since then had only arisen by reason of the delay on the part of the corporation to have the objections lodged in that year determined by a court of summary jurisdiction pursuant to the provisions of the Act.

On behalf of the corporation it was contended that they were in the case of each resolution entitled to apply to the court of summary jurisdiction at any time after the expiration of one month from the date of first publication of such resolutions and were under no duty to make any such application until there was reasonable anticipation of practical commencement of the work in the near future; that they were entitled to abandon proposals made under the Act having regard, among other factors, to objections which had been lodged and in particular were entitled to and did abandon their 1931 proposals; that they did not by such abandonment of their 1931 proposals bar themselves thereafter from time to time when the conditions of section 6 of the Act were satisfied from making resolutions in pursuance of the Act; that they were under no duty to give notice of the abandonment or indefinite deferment of their 1931 proposals; that on April 7, 1948, the conditions set out in section 6 of the Act were satisfied and the corporation's resolution of that date in pursuance of that section was valid; that the frontagers were less likely to be prejudiced by the resolution of April 7, 1948, than by an amendment of the 1931 proposals in view of the lapse of time, the probability of changes of ownership and the possibility of objecting

on all the grounds set out in section 7, and not merely on those set out in section 11; and that the 1948 and 1952 proposals being valid by reason of the foregoing contentions and the provisions of the Act, the frontagers were bound in law to pay the cost of making up the road in the proportions set out in the apportionment of the estimated expenses dated December 13, 1951.

The magistrate was of the opinion that the corporation's resolution of January 2, 1952, amending the estimate and provisional apportionment referred to in the resolution of April 7, 1948, was valid, and that the frontagers' objections accordingly failed, and he dismissed the objections.

The frontagers appealed.

Andrew Rankin for the appellant frontagers.

David McNeill for the corporation.

The following cases were cited in argument: *Southampton Corporation* v. *Lord*[2]; *Barry and Cadoxton Local Board* v. *Parry*[3] and *Faulkner* v. *Hythe Corporation.*[4]

LORD PARKER C.J. Salmon J. will give the first judgment.

SALMON J. On September 17, 1931, the respondents, the Liverpool Corporation, passed a resolution pursuant to section 6 of the Private Street Works Act, 1892, to make up a certain roadway, known as Leinster Road, in the City of Liverpool. [His Lordship referred to sections 6 and 7 of the Act of 1892 and continued:] The formalities provided for by section 6 were duly complied with by the corporation and an objection was made on behalf of certain of the frontagers concerned that the works were unreasonable and the estimated expenses excessive. Section 8 lays down the manner in which objections are to be heard and determined. [His Lordship read section 8 of the Act and continued:] The corporation, however, took no step to have the objections determined and nothing further occurred until April 7, 1948, when the corporation passed a fresh resolution to make up Leinster Road. This resolution was silent as to the 1931 resolution. The formalities required by the Act were duly complied with and objections were duly lodged on behalf of the owners of premises adjoining Leinster Road. No action was taken by the corporation to have those objections determined under section 8 of the Act and the next thing that occurred was that on January 2, 1952, the corporation resolved, pursuant to section 11 of the Act, to amend the estimate of the probable expenses of making up the road and the provisional apportionment of these expenses amongst the owners of the premises adjoining the road.

[2] (1903) 67 J.P. 189; 1 L.G.R. 324.

[3] (1895) 59 J.P. 421.

[4] [1927] 1 K.B. 532; 43 T.L.R. 55.

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[His Lordship read section 11 and continued:] It is to be observed that under section 7 the objections to the original resolution may be made on one of six grounds; under section 11 the objections to the amendments can be made only on one of two grounds. The formalities required in connection with the publication of the amending resolution were complied with, and objections were duly lodged on behalf of most of the frontagers concerned. The corporation waited until 1957 or 1958 and then applied for the determination of those objections to the stipendiary magistrate of the City of Liverpool, who ruled that the objections failed, and it is from that ruling that the frontagers now appeal.

The first point taken on the appellants' behalf is that the corporation must be deemed to have abandoned the resolution of 1931, and that that abandonment precludes it from passing any further resolution to make up the road. It is argued that the abandonment takes away the corporation's right under the Act of 1892, and that, if the corporation is to make up the road in future, it will have to do so at its own expense. It is a startling proposition that if an urban authority abandons a resolution for making up a road under this Act, it for ever loses its power in the future to pass another resolution under the Act for the purpose of making up the road. That argument seems to me to lead to very strange and, indeed, ridiculous results and to be contrary to the plain words of the section. It is to be observed that section 6 is an empowering section, and by its express words gives a power which the urban authority may exercise from time to time; indeed, the Act clearly by its language contemplates that whenever the urban authority considers that public convenience or safety demands that the road shall be made up, it shall exercise its powers. To say that because, for example, in the year 1893 the local authority had a scheme for making up the road which on objection was abandoned, it is for ever thereafter precluded from exercising the express powers given under section 6, seems to be contrary to the plain words of the statute. Supposing that in 1959 public convenience and safety clearly required that the corporation should exercise its rights under section 6 in respect of a certain road and the corporation duly passed a resolution under section 6, any person to be charged with the expense of making up the road under the Act could, if Mr. Rankin is right, successfully argue in an objection to the resolution by showing that, say, in 1893 there had been a proposal to make up this road which had been abandoned. I cannot believe that an argument that leads to such a strange result is right, particularly when it is directly contrary to the words of the statute. I should be reluctant to give effect to that argument unless I was compelled to do so by plain authority. There is no such authority, and, accordingly, in my view the argument fails.

The next point taken by Mr. Rankin is this. He says, in the alternative, that there was no abandonment of the 1931 resolution; that it is alive and that, therefore, the corporation was wrong in passing the resolution which it purported to pass in 1948; it should then not have started de novo but, since the resolution of 1931 was in being, the corporation should have proceeded by way of amendment under section 11 of the Act; accordingly, the resolution which it did pass is void and of no effect. This argument turns upon whether there was an abandonment or not. I do not pause to consider what the effect might be if there were no abandonment, since I take the view that there clearly was an abandonment and the question of what the position might be if there were none is not material. The argument proceeds on this basis. First of all, as I understand it, Mr. Rankin says that a resolution once made and objected to cannot be abandoned because section 8 of the Act is mandatory and imposes an obligation to have those objections determined by a court of summary jurisdiction. I think that that argument involves a misconception, and I do not consider that it is in any way supported by *Faulkner* v. *Hythe Corporation*,[1] upon which the appellants relied. In my judgment all that the Act lays down and all that that case states is that before the expense of making up the road can be recovered from the frontagers, their objections must be heard and determined by a court of summary jurisdiction. Moreover, that case is also an authority for the proposition that it is not permissible for a corporation to proceed with the works before the objections have been heard.

Then it is said that there was a letter written in August 1957 to the representative of one of the objectors in which the town clerk stated as follows: "Notices under the above Act were "served upon the frontagers first in 1931. A majority of owners "then objected to the proposal and the city council decided "accordingly to defer indefinitely the proposal to carry out the "work." It is said that is a letter from the town clerk stating that the proposal was deferred indefinitely and that that letter is quite inimical to the view that the resolution was abandoned. I do not agree with that contention. I do not think that there is anything which prevents the corporation from abandoning a scheme set out in a resolution, say, in the year 1910 and then 20 or 30 years later making a fresh scheme by a new resolution. You abandon the scheme of 1910, but the proposal that the road may be made up when necessary is not abandoned; that is indefinitely deferred. Indeed, it seems to me that the Act, by stating in section 6 that the urban authority may from time to time pass a resolution, makes it impossible for an authority to resolve that it shall never pass any resolution in respect of making up the road. It is impossible to regard anything done by an authority as putting it out of its power ever in the future to

[1] [1927] 1 K.B. 532; 43 T.L.R. 55.

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exercise the powers expressly conferred upon it by the Act. The fact that in 1957 the town clerk said in a letter written to the frontagers that the proposal of 1931 was indefinitely deferred is not material on which it can successfully be argued that the resolution of 1931 has not been abandoned. On the facts of this case it is impossible to come to any view other than that the resolution of 1931 was abandoned. Nothing happened for 17 years and then in 1948 a fresh resolution was passed adopting a fresh scheme. It is as plain as possible on those facts that the corporation had indeed abandoned the resolution of 1931.

Mr. Rankin seeks to derive some comfort from *Southampton Corporation* v. *Lord*,[2] and he relies upon an obiter dicta of Mathew L.J.[3] That case deserves to be examined in order to appreciate what Mathew L.J. meant when he spoke the words relied on. It appears that on April 14, 1897, a resolution was passed by the Southampton Corporation that a certain street should be sewered, levelled, paved, metalled, flagged, channelled and made good and properly lighted, and formalities were duly complied with by the preparation of the necessary specification, plans, sections, estimate and provisional apportionment. Then by resolution of July 28, 1897, those documents were duly approved without modification or addition. During the statutory period of one month the frontagers concerned delivered what was called a memorial of objections. It was an informal document which, amongst other things, set out the reasons why they desired that the proposals of the corporation should not be carried into effect. As a result of that memorial the corporation met again in October of 1897 and introduced a new scheme, which provided that the same road should have the work done to it which had been envisaged by the first scheme a few months earlier, but only for about half its distance, and that for the rest of its length the work should be confined to sewering the road. That new resolution was approved on December 22, 1897, by the corporation and all the various specifications, plans, sections and apportionment in connection with it. The resolution of December 22 was duly published and no memorial or objection of any kind was made to the second scheme. The work was carried out and the corporation in the action sought to recover the appropriate expenses from the defendant, who was one of the frontagers. The point taken on behalf of the defendant was that there had been no abandonment of the first resolution, that the memorial which had been delivered on behalf of the frontagers was an objection under section 7 of the Act, and that, since that objection had not been adjudicated upon by a court of summary jurisdiction, the plaintiffs, the Southampton Corporation, could not recover from the defendant. The point taken on behalf of the corporation was

[2] (1903) 67 J.P. 189; 1 L.G.R. 324.

[3] 67 J.P. 189, 191.

that the first resolution confirmed in July had been abandoned; that no objection had been made to the second scheme approved in December of the same year, and, therefore, it could recover in the action. Alternatively, the corporation took the point that if the first scheme confirmed in July had been abandoned and that no objection had been made to the second scheme approved in December of the same year, and, therefore, it could recover in the action. Alternatively, the corporation took the point that if the first scheme had not been abandoned and if the defendant was right in suggesting, as he did, that the second scheme of December must merely be regarded as an amendment of the first scheme, then the memorial was not an objection under section 7 and there was in any event, whichever scheme was looked at as the effective scheme, a scheme which had not been objected to, and, therefore, the works had been done pursuant to resolutions which had not been objected to and the plaintiffs were entitled to succeed.

Wright J. held that the scheme which was finally confirmed in July of 1897 had been abandoned. It seems that he held it had been abandoned on the ground that when the second scheme was confirmed in December, and had been duly advertised and had been served on the parties concerned, it was quite plain to anyone that the old scheme was not going forward, but that the corporation had abandoned it and was putting forward a new one in its place. The case which this court is considering is, of course, much stronger because this is not a case of a few months but of 17 years having elapsed between the two resolutions, and, as I have already indicated, it seems to me to be plain and obvious that no one in 1948, except by the exercise of a good deal of disingenuousness, could have been under any misapprehension about whether or not the 1931 resolution had been abandoned. Wright J., who was a great authority on this branch of the law, came to the conclusion that the first scheme had been abandoned, and it seems from that to follow that he was of the opinion that there was power to abandon it in the way in which the corporation abandoned it in that case. He also held that in any event the memorial did not constitute an objection under section 7, and on that ground also, abandonment or no abandonment, the defence failed.

When the case went to the Court of Appeal Vaughan Williams and Stirling L.JJ. expressed no opinion on the abandonment point because they were firmly of the view that in any event the memorial did not constitute an objection under the Act. Mathew L.J., who also came to the conclusion that the memorial did not constitute an objection under section 7 of the Act, said as follows, and this is the passage relied on by Mr. Rankin: "With reference to the other point, I desire to guard myself "against being supposed to yield to the argument that the local "authority cannot withdraw a scheme of this sort—that it cannot

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"by public notice served upon everyone intimate that the pro-"ceedings have been abandoned. I see no reason at present for "holding that such a course cannot be maintained, but it may "be a matter which may have to be discussed hereafter, and "discussed at length." It has been discussed in this court, and it has been suggested that Mathew L.J. was saying that a scheme, if it could be abandoned at all, could only be abandoned by express notice. I do not read that passage as meaning anything of the sort. I consider that all that Mathew L.J. was saying was that he was far from deciding that a scheme could not be abandoned, and then he gave an example of how it could be abandoned, and one of the obvious ways in which it could be abandoned, of course, was by direct notice. It is also interesting to observe that having said that, and having apparently expressly reserved the point, at the very end of his judgment he says: "I "agree that the appeal must be dismissed, and I agree through-"out with the judgment of my brother Wright." Whether he meant the whole of the judgment, as he seems to say, I do not know; this is perhaps not a very extensive report, but I think that the proper way of looking at it is that the point was left open in the Court of Appeal but that the decision of Wright J. is quite inimical to the contention now being put forward on behalf of the present appellants. For my part I agree with Wright J.

It is said also, and this is the final point, that considerable hardship has been put upon these frontagers and that the corporation have waited and waited during a period in which costs were steadily mounting, and that now the work is to be done in 1959 when it will cost the frontagers very much more than it would have cost them in 1931 or even in 1948 or 1952. It may very well be that that is the case, but it hardly lies in the mouth of these appellants to complain. The corporation wished to do the work in 1931 and but for the objection of the appellants would presumably have done it then. It wanted to do the work again in 1948 and again the appellants objected. Then there was an amendment of the scheme in 1952 and there was a further objection by the appellants. It was conceded when this matter was before the magistrate that it was necessary and desirable that this road should be made up on the facts as they then existed.

The two points of law taken are, in my view, without any real foundation, and I would dismiss the appeal.

Donovan J. I agree. I would add only this in deference to Mr. Rankin's argument. I think that on the facts it is indisputable that the 1931 scheme, by which I mean the proposal to make up the road according to a certain specification at a specified cost, was abandoned as a scheme. Mr. Rankin says that it follows that no new scheme can ever be proposed by the corporation except one which will be executed at its own cost. I have tried to understand why that consequence should follow

as a matter of law, but I have failed. It seems to me to conflict with the plain terms of section 6 of the Act, which empowers the urban authority from time to time to resolve to do these works and serve the specification upon the frontagers with a view to recovering the cost from them. I also think that the magistrate came to a correct conclusion in this case.

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LORD PARKER C.J. I agree and there is nothing that I can usefully add.

Appeal dismissed.

Solicitors: *Purchase, Clark & Treadwell for Rollo & Mills-Roberts, Liverpool; Cree, Godfrey & Wood for T. Alker, Town Clerk, Liverpool.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

MIDLAND SILICONES LTD. *v.* SCRUTTONS LTD.

1959 *April* 28.

Diplock J.

Shipping—Bill of lading—Discharge—Hague Rules—Limitation of liability—Stevedores engaged by carrier—Action against stevedores for admitted negligence—Whether entitled to protection of limitation—"Carrier"—Carriage of Goods by Sea Act of United States, 1936, *ss.* 1 (*a*), 4 (5)—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Art. IV, r.* 5.

Contract—Implied term—Benefit to third party.

Contract—Parties—Enforcement by third party.

Bailment—Bald or sub-bailment—Stevedores—Possession in goods vested in stevedores by carrier for purpose of unloading—Whether stevedores entitled to benefit of contract between carrier and consignee.

By a bill of lading, which incorporated the United States Carriage of Goods by Sea Act, 1936, and limited to $500 per package the liability of the carrier in the event of loss, damage or delay, a drum containing chemicals was shipped from America to London. The defendants, who were stevedores engaged by the carrier, while lowering the drum from an upper floor of a dock transit shed on to a lorry, negligently dropped and damaged the drum when delivering it to the consignees in accordance with the bill of lading, causing part (worth £593) of its contents to be lost.

The consignees sued the stevedores in tort claiming £593. The stevedores, relying on the bill of lading, claimed that their liability was limited to $500 (£179):—

Held, that there was no principle of vicarious immunity from liability for torts; that the contract of carriage contained in the bill of lading was one to which the defendants were not parties and for which they gave no consideration to the plaintiffs; and, therefore, that the stevedores were not entitled to limit their liability.

Dictum of Lord Haldane in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 853; 31 T.L.R. 399; *Wilson* v. *Darling Island Stevedoring Co.* [1956] 1 Lloyd's Rep. 346

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and *Robert C. Herd & Co.* v. *Krawill Machinery Corporation* (1959) (U.S. Supreme Court) not yet reported, applied.

Dicta of Scrutton L.J. in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.* (1925) 21 Ll.L.R. 375, 378; and of Denning L.J. in *Smith and Snipe's Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, 514; sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179; *White* v. *John Warwick & Co.* [1953] 1 W.L.R. 1285, 1294; [1953] 2 All E.R. 1021; and *Adler* v. *Dickson* [1955] 1 Q.B. 158, 181; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397 doubted.

Elder, Dempster v. *Paterson, Zochonis* [1924] A.C. 522; 40 T.L.R. 464 explained.

Action.

The following facts were agreed:

On or about March 26, 1957, a drum containing chemicals was shipped in New York by Dow Corning Corporation to London on the S.S. *American Reporter* consigned to the order of the plaintiffs, Midland Silicones Ltd., upon the terms of a bill of lading dated March 26, 1957, which incorporated the terms of the carrier's regular long form bill of lading. Clause 1 of the short form provided that its terms and those of the long form "shall govern the relations, whatsoever they may be, between "shipper, consignee and the carrier, master and ship in every "contingency, wheresoever and whensoever occurring and "whether the carrier be acting as such, or as bailee, and also "in the event of, or during deviation or of conversion of the "goods . . ." Clause 3 of the short form (and clause 1 of the long form) provided that: "This bill of lading shall have effect "subject to the provisions of the Carriage of Goods by Sea Act "of the United States, approved April 16, 1936, which shall be "deemed to be incorporated herein . . . The provisions stated "in said Act . . . shall govern before the goods are loaded on and "after they are discharged from the ship and throughout the "entire time the goods are in the custody of the carrier." Clause 3 of the long form provided that: "In this bill of lading ". . . the word 'carrier' shall . . . include the ship . . . her "owner, operator and demise charterer, and also any time "charterer or person, to the extent bound by this bill of lading, "whether acting as carrier or bailee." Condition 24 of the long form provided that: "In the event of any loss, damage or delay "to or in connection with goods exceeding in actual value 500 "dollars per package lawful money of the United States, or in "case of goods not shipped in packages, per customary freight "unit, the value of the goods shall be deemed to be 500 dollars "per package or per customary freight unit, as the case may be, "and the carrier's liability, if any, shall be determined on the "basis of a value of 500 dollars per package or per customary "freight unit, unless the nature and a higher value shall be "declared by the shipper in writing before shipment and inserted "in this bill of lading. It is agreed that the meaning of the

"word 'package' includes animals, pieces and all articles of any "description except goods shipped in bulk."

Condition 4 of the long form provided that: "If the ship is "not owned by or chartered by demise to the United States "Lines Company, this bill of lading shall, with respect to the "carriage, custody and care of the goods while aboard the ship "or on her tackles, have effect only as a contract between the "shipper, consignee and the owner of the ship or demise "charterer, as the case may be, as principal made through the "agency of said company which shall be under no liability "whatsoever for loss of or damage to the goods or with respect "to such carriage, custody and care of the goods. If it shall be "adjudged that the United States Lines Company or any person "other than the owner or demise charterer is the carrier or bailee "of the goods, all rights, exemptions, immunities and limitations "of liability provided by law and all terms of this bill of lading "shall be available to it or such other person." Condition 17 provided (inter alia): ". . . and the carrier and master have the "right to appoint stevedores, master-porters and other agents ". . ."

Section 1 (*a*) of the United States Carriage of Goods by Sea Act, 1936, provides that: "The term 'carrier' includes the "owner or the charterer who enters into a contract of carriage "with a shipper." Section 4 (5) provides that: "Neither the "carrier nor the ship shall in any event be or become liable for "any loss or damage to or in connection with the transportation "of the goods in an amount exceeding 500 dollars per package "lawful money of the United States . . . unless the nature and "value of such goods have been declared by the Shipper before "shipment and inserted in the bill of lading."

The owners of the vessel and the carriers of the drum were United States Lines. At all material times the defendants, Scruttons Ltd., acted as stevedores and agents on behalf of United States Lines in London upon the terms of a stevedoring contract dated August 11, 1952, which provided that: "The "Stevedores are to be fully responsible for any damage to vessel "or other property and any damage to or loss of cargo while "being handled or stowed, unshipped or delivered, or while in "stowage, if any damage caused by any negligence of themselves "or their servants. The Stevedores to have such protection as "is afforded by the terms, conditions and exceptions of the Bills "of Lading Westbound and Eastbound." The plaintiffs were not at any material time personally aware of the existence or terms of the stevedoring contract.

No declaration as to the value of the drum was at any time made or inserted in the bill of lading pursuant to section 4 (5) of the United States Carriage of Goods by Sea Act, 1936, or Condition 24 of the long form bill of lading.

On April 12, 1957, Neale & Wilkinson & Co. Ltd., the plaintiffs' London forwarding agents, presented the bill of lading of

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March 26 to the London office of United States Lines, who stamped it with a release stamp asking the defendants, "subject "to safe arrival," to release the goods.

On or about April 14, 1957, the vessel commenced to discharge her cargo at the dock berth alongside D Transit Shed, Royal Victoria Dock. At all material times United States Lines paid an annual rental to the Port of London Authority for the use of the quay and transit sheds at this berth upon the terms of an agreement dated May 7, 1935. On or about April 15, 1957, servants of the defendants discharged the drum from the vessel and transferred it to a place on the upper floor of D shed. On May 1, 1957, H.M. Customs cleared the drum.

On May 3, 1957, the P. L. A. received a delivery note from Neale & Wilkinson & Co. Ltd., the plaintiffs' London forwarding agents, requesting delivery of the drum to Tingle Jacobs & Co., cartage contractors. On the same day the P. L. A., in accordance with normal practice, issued a landing order, addressed to the defendants, to the driver of Tingle Jacobs' lorry, and the driver delivered the landing order to a servant of the defendants who worked in the dock office of United States Lines. Servants of the defendants removed the drum to an opening on the top floor of D shed and prepared to sling the drum down on to the lorry. While the drum was being lowered on to the lorry it was dropped and damaged owing to the negligence of the defendants' servants and some of its contents were lost. The value of the lost contents and the loss sustained by the plaintiffs was £593 12s. 2d.

It was common ground between the parties at the trial that the bill of lading was still in force when the drum was dropped.

A. A. Mocatta Q.C. and *Michael Kerr* for the plaintiffs.
Eustace Roskill Q.C. and *R. P. Colinvaux* for the defendants.

In addition to the cases referred to in the judgment, the following were cited in argument: *Hall* v. *Brooklands Auto Racing Club* [1]; *Fosbroke-Hobbes* v. *Airwork Ltd.* [2]; *The Kite* [3]; *Vita Food Products, Incorporated* v. *Unus Shipping Co. Ltd.* [4]; *Gilbert Stokes and Kerr Proprietary, Ltd.* v. *Dalgety & Co. Ltd.* [5]; *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.* [6]; *United States* v. *The South Star* [7]; *Ford Motor Co.* v. *Jarka Corpn.* [8]; *International Milling Co.* v. *The Perseus and Nicholson Transit Co.* [9]; *Govett* v. *Radnidge* [10]; *Earl* v. *Lubbock* [11]; *Donoghue* v. *Stevenson* [12]; *Waters & Steel* v. *Monarch Fire & Life*

[1] [1933] 1 K.B. 205; 48 T.L.R. 546.
[2] (1937) 56 Ll.L.Rep. 209.
[3] [1933] P. 154; 49 T.L.R. 525.
[4] [1939] A.C. 277; 55 T.L.R. 402; 1 All E.R. 513.
[5] (1948) 31 Ll.L.Rep. 337.
[6] [1951] 2 Lloyd's Rep. 385.
[7] 1954, 1 A.M.C. 418; 210 F. 2d. 44.
[8] 1954, 1 A.M.C. 1095.
[9] [1958] 2 Lloyd's Rep. 272.
[10] (1802) 3 East 62.
[11] [1905] 1 K.B. 253; 21 T.L.R. 71.
[12] [1932] A.C. 562.

Assurance Co.[13]; *Allen* v. *Canadian Pacific Rly.*[14]; *Prudential Staff Union* v. *Hall*[15]; *Scotson* v. *Pegg*[16]; *Bristol and Exeter Rly.* v. *Collins.*[17]

Cur. adv. vult.

April 28. DIPLOCK J. read the following judgment. This is a test case brought to determine whether stevedores engaged by the shipowner (or carrier), who, in performance of their functions as stevedores, in loading, unloading or delivering cargo, tortiously damage that cargo, can, in an action for tort brought against them by the cargo-owner, rely upon any immunity from or limitation of liability contained in the contract of affreightment made between the cargo-owner and the shipowner (or carrier) by whom the stevedores are engaged.

This question has been much debated in this country in the past twenty-five years, but has not yet been authoritatively decided here. In Australia it was authoritatively decided in the negative by a majority judgment of the High Court of Australia in 1956 (*Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*[1]). This overruled two earlier decisions by lower courts. In the United States, after considerable litigation, with varying results, it was authoritatively decided in the same sense as recently as last week by a unanimous judgment of the United States Supreme Court in *Robert C. Herd & Co.* v. *Krawill Machinery Corporation,*[2] the reference to which I cannot give.

The facts of the present case (which are agreed) were intended to and, I think, succeed in raising the bald point of principle. The goods in question, a drum containing chemicals, were shipped by the consignors upon a ship owned by U.S. Lines Incorporated for carriage to London, consigned to the order of the plaintiffs, upon the terms of the shipowners' standard bill of lading, dated March 26, 1957, signed on behalf of the shipowners. No declaration of value was made. The bill of lading was forwarded by the consignors to the plaintiffs on April 1, 1957, and the plaintiffs then became, and at all material times thereafter remained, the owners of the drum.

The U.S. Lines had for some years past engaged the defendants (who are a well-known stevedoring company) to discharge their vessels at the Port of London and to act as the U.S. Lines' agents in the delivery of goods to consignees. This was under an agreement between the U.S. Lines and the defendants dated August 11, 1952, which contained a clause stating expressly that the stevedores were to be responsible for any damage to goods caused by any negligence of themselves or their servants, but added: "The stevedores to have such protection as is afforded

[13] (1856) 5 E. & B. 870.
[14] (1910) 21 Ontario L.R. 416.
[15] [1947] K.B. 685; 63 T.L.R. 392.
[16] (1861) 6 H. & N. 295.
[17] (1859) 7 H.L.C. 194.
[1] [1956] 1 Lloyd's Rep. 346.
[2] Unrep. in Supreme Court, but see [1958] 3 Lloyd's Rep. 159.

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"by the terms, conditions and exceptions of the Bills of Lading "Westbound and Eastbound."

The drum with which this case is concerned was duly unloaded by servants of the defendants. The plaintiffs, who had not yet obtained customs clearance, were not in a position to take delivery immediately upon discharge, and the drum was stored temporarily in a shed leased by United States Lines from the Port of London Authority. The plaintiffs obtained customs clearance on May 1, 1957, and on May 3 applied to the defendants for delivery. Servants of the defendants in the shed leased by United States Lines then moved the drum to the verandah of the shed and were in process of lowering it to the plaintiffs' lorry, which was on a part of the wharf leased to United States Lines, when they negligently dropped it and caused damage to the amount of £593 12s. 2d., for which sum the present action, based on such negligence, is brought against the defendants.

In this summary of facts I have omitted, for I do not think them germane to any issue that I have to decide, any detailed reference to the various documents issued or indorsements made by the United States Lines, the Port of London Authority, the defendants and their tally clerk, the plaintiffs and their forwarding agents, and others engaged in the elaborate process of importing a drum of chemicals into the Port of London and on to the lorry of the consignees. It is sufficient to say that the act of lowering the plaintiffs' drum on to the lorry which was negligently performed by the defendants' servants was (1) an act which fell within the scope of the defendants' servants employment by the defendants, (2) an act which, by the terms of their contract with United States Lines, the defendants had contracted with United States Lines to do, and (3) an act which, by the terms of the bill of lading and the events which happened, United States Lines had contracted with the plaintiffs to do.

The defendants do not dispute that they are vicariously liable for the tortious acts of their servants committed in the course of their employment by the defendants. They contend, however, that they are entitled in the present action to limit their liability to the equivalent of $500 U.S. or £179 1s. and that judgment for no greater sum should be awarded against them.

Since a tortfeasor, and his employer who is vicariously liable for his tort, is in general liable for the full extent of the damage caused by the tort, it is for the defendants to show some principle of law which qualifies this general rule in the present case.

They point, in the first instance, to the bill of lading signed on behalf of United States Lines, which contains the terms of the contract under which the drum was carried. The bill of lading was in a short form, which however incorporated the terms of the United States Lines' long form bill of lading. By clause 1 of the short form it was provided that its terms and those of the long form "shall govern the relations, whatsoever they may be, "between shipper, consignee and the carrier, master and ship in

"every contingency, wheresoever and whensoever occurring." There is no mention of stevedores. An identical provision appeared in the long form bill of lading.

By the clause paramount, which was clause 3 of the short form, and also by clause 1 of the long form, the provisions of the Carriage of Goods by Sea Act of the United States, 1936, were incorporated, and it was expressly provided that such provisions, with irrelevant exceptions, "shall govern before the goods are "loaded on and after they are discharged from the ship and "throughout the entire time that the goods are in the custody "of the carrier."

The relevant provision of the United States Carriage of Goods by Sea Act, 1936, thus incorporated is that of section 4 (5), namely: "Neither the carrier nor the ship shall in any event "be or become liable for any loss or damage to or in connection "with the transportation of the goods in an amount exceeding "$500 per package lawful money of the United States," unless —as was not the case here—a declaration of value has been made.

Condition 24 of the long form contained a somewhat wider provision, of which the relevant words are: "In the event of any "loss, damage or delay to or in connection with goods exceeding "in actual value $500 per package lawful money of the United "States . . . the value of the goods shall be deemed to be $500 "per package . . . and the carrier's liability, if any, shall be "determined on the basis of a value of $500 per package. . . ."

The United States Carriage of Goods by Sea Act, 1936, like the corresponding United Kingdom Act, contains no definition of "carrier," but provides by section 1 (*a*): "The term 'carrier' "includes the owner or the charterer who enters into a contract "of carriage with a shipper"; and so far as reliance is placed on the incorporation in the bill of lading of section 4 (5) of the United States Carriage of Goods by Sea Act, 1936, no express definition of "carrier" contained in the bill of lading can extend the meaning of the word "carrier" in that subsection.

So far as reliance is placed upon condition 24 of the long form, one must read into that condition the express provisions of condition 3, which provide: "In this bill of lading . . . the "word 'carrier' shall . . . include the ship . . . her owner, "operator and demise charterer, and also any time charterer or "person, to the extent bound by this bill of lading, whether acting "as carrier or bailee." This does not include stevedores unless they are, by some other principle of law, bound by the bill of lading.

It does not, therefore, seem to me that the words either of the Act or of the bill of lading relating to the meaning of the word "carrier" so extend its meaning as to include stevedores engaged by the carrier, and I hold that the bill of lading, upon its true construction, does not purport, by any express words, to "govern the relations whatsoever they may be between the "shipper or consignee" and any stevedores engaged by the

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carrier. In so far as my so holding depends upon the true construction of the Carriage of Goods by Sea Act of the United States, I have the powerful support of the United States Supreme Court.

In so holding I have not overlooked, although I have rejected, Mr. Roskill's arguments to the contrary based on conditions 4 and 17 of the long form bill of lading, the former of which seems to me to be no more than an elaboration of the well-known English "demise clause," while the latter merely authorises the carrier or master to appoint stevedores and other agents, which he would be entitled to do even if that clause were absent.

The limitation of liability upon which the defendants seek to rely is thus contained, and contained only, in a contract which they did not execute and which does not purport expressly to be made on their behalf. One starts, therefore, with two principles which—regret them though some may—were described by Lord Haldane in a decision binding upon me as fundamental in the law of England.[3] "One is that only a person who is a party "to a contract can sue on it. Our law knows nothing of a jus "quaesitum tertio arising by way of contract. Such a right may "be conferred by way of property, as, for example, under a trust, "but it cannot be conferred on a stranger to a contract as a right "to enforce the contract in personam. A second principle is that "if a person with whom a contract not under seal has been made "is to be able to enforce it consideration must have been given "by him to the promisor or to some other person at the "promisor's request. These two principles are not recognised "in the same fashion by the jurisprudence of certain Continental "countries or of Scotland, but here they are well established."

Either of the principles seems at first sight fatal to the defendants' claim to limit their liability. They were not ostensible or disclosed parties to the contract contained in the bill of lading. That United States Lines had agreed or would agree to engage them to discharge the plaintiffs' goods was unknown to the plaintiffs.

To seek to overcome this difficulty by asserting that United States Lines contracted as agents for the defendants as undisclosed principals leads immediately to an insoluble problem as to which of the many terms of the entire contract of carriage were entered into on behalf of the defendants, and what contractual obligations, if any, the defendants undertook by virtue of the bill of lading in relation to the goods. It seems to me to be quite impossible to say that the defendants were ever in any contractual relationship with the plaintiffs as the undisclosed principals of the United States Lines.

If then the well-known rule as to the right of undisclosed principals to sue upon a contract made on his behalf is to be

[3] *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 853; 31 T.L.R. 399.

regarded as an exception to the first of Lord Haldane's fundamental principles—and he clearly did not so regard it—it does not, in my view, assist the defendants in this case, nor do either of the two well-recognised exceptions, namely, a right to take the benefit of a contract which is conferred by way of property (as, for example, under a trust or by way of assignment) or a right to enforce covenants running with the land, which are in this respect assimilated to proprietary rights.

The defendants, however, contend that there is another exception which covers the present case. The principle relied upon was expressed, in its neatest form, as one would expect, by Scrutton L.J. in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.*[4] as follows: "Where there is a contract which contains "an exemption clause, the servants or agents who act under that "contract have the benefit of the exemption clause. They "cannot be sued in tort as independent people, but they can "claim the protection of the contract made with their employers "on whose behalf they are acting."

This was admittedly obiter, but was said by Scrutton L.J. to be the effect of the decision of the House of Lords in *Elder Dempster* v. *Paterson, Zochonis.*[5] If the House of Lords did really lay down this principle (which I may conveniently describe in a phrase borrowed from Holmes J., United States judge, in his dissenting judgment in *A. M. Collins & Co.* v. *Panama Railway Co.*,[6] as "vicarious immunity from liability for torts") it disposes of the present case in the defendants' favour. Bankes L.J., however, in *Mersey Shipping & Transport Co. Ltd.* v. *Rea Ltd.*,[7] expressed a different view as to the ratio decidendi of the *Elder Dempster* case.[8]

While I think that Scrutton L.J.'s dictum accurately reflects his own ratio decidendi in his dissenting judgment in the *Elder Dempster* case[8] in the Court of Appeal, I cannot accept that it represents that of the majority of the House of Lords.

The *Elder Dempster* case[8] was one in which the facts were very special. Goods were shipped on a ship owned by Griffiths Steam Navigation Co. and time chartered on a gross time charter by them to Elder Dempster. Mate's receipts were issued in the name of the African Steamship Co. and bills of lading were headed with the names of the African Steamship Co. and the British & African Steam Navigation Co. Ltd., followed by the words "Managers Elder Dempster & Co. Ltd." The body of the bill of lading, which contained no definition of the word "ship-"owners," expressly stated that its terms and conditions constituted "the contract between the shippers and the shipowners." One bill of lading was signed "P. Bedford, Master," the other "P. Bedford, Agent." It was the master's personal negligence in the stowage of the cargo which caused the damage to the

[4] (1925) 21 Ll.L.Rep. 375, 378.
[5] [1924] A.C. 522; 40 T.L.R. 464.
[6] 1952 A.M.C. 2054.
[7] 21 Ll.L.Rep. 375.
[8] [1924] A.C. 522.

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goods. The relevant issue was whether Griffiths Steam Navigation Co., as employers of the master, when sued in tort by the cargo-owning consignors, could rely upon a contractual immunity from liability for damage due to bad stowage conferred upon the "shipowners" by a condition in the bill of lading.

Their Lordships' judgments have been so closely and so recently analysed by Pilcher J. and by the Court of Appeal in England in *Adler* v. *Dickson*,[9] and by the High Court of Australia in *Wilson's* case,[10] with such differing results, that I propose to add as little as possible to the literature on this fascinating topic. I accordingly limit myself to expressing my own and very hesitant view that: (1) Lord Cave's ratio decidendi was, first, that Griffiths Steam Navigation Co. were parties to the contract of carriage, that is, that P. Bedford signed on their behalf as well as on behalf of the charterers. This I call the "express "contract" theory. Alternatively, Lord Cave was prepared to base his decision on the theory of vicarious immunity from liability for torts. (2) Lord Finlay's ratio decidendi was that when the cargo-owners delivered possession of the goods to the Griffiths Steam Navigation Co., an implied contract was thereby made between them and Griffiths Steam Navigation Co. that the latter should carry the goods on the terms of the bill of lading. I call this, for convenience, the "implied contract" theory; but also observe that there are some words in Lord Finlay's speech which suggest that he may, like Lord Cave, have been adopting the express contract theory. (3) Lord Sumner's first and preferred ratio decidendi was the implied contract theory. Alternatively, he suggested that the master, whose negligence was the cause of the damage, was not acting as agent for Griffiths Steam Navigation Co. so as to make them vicariously liable for his negligence. (4) Lord Dunedin agreed with Lord Sumner. (5) Lord Carson agreed with both Lord Sumner and Lord Cave, which gives him four different ratio decidendi.

If it be permitted to count heads, three (Lords Dunedin, Sumner and Carson), or if Lord Finlay is included, as probably he should be, four of their Lordships approved the implied contract theory, and three (Lords Sumner, Dunedin and Carson), as second choice, preferred the "master not the servant of the "shipowners" theory. Two (Lords Cave and Carson), or possibly three if Lord Finlay can be included, adopted the express contract theory. Two only (Lords Cave and Carson) adopted the vicarious immunity theory.

I respectfully agree with Jenkins and Morris L.JJ. in *Adler* v. *Dickson*[11] and with Fullager J. and Kitto J. in *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*[12] and with the Supreme Court of the United States that the *Elder Dempster* case[13] is no

[9] [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397.
[10] [1956] 1 Lloyd's Rep. 346.
[11] [1955] 1 Q.B. 158.
[12] [1956] 1 Lloyd's Rep. 346.
[13] [1924] A.C. 522.

authority for the principle of vicarious immunity from liability for torts, and that Scrutton L.J. incorrectly stated its effect.

It is, I think, a case which must be read with the warning given by Lord Halsbury in *Quinn* v. *Leathem*,[14] referring to *Allen* v. *Flood*,[15] that "every judgment must be read as applicable to "the particular facts proved, or assumed to be proved, since the "generality of the expressions which may be found there are not "intended to be expositions of the whole law, but governed and "qualified by the particular facts of the case in which such "expressions are to be found . . . a case is only an authority "for what it actually decides. I entirely deny that it can be "quoted for a proposition that may seem to follow logically from "it. Such a mode of reasoning assumes that the law is neces-"sarily a logical code, whereas every lawyer must acknowledge "that the law is not always logical at all."

But to reject Scrutton L.J.'s explanation of the ratio decidendi of the *Elder Dempster* case[16] does not dispose of the case I have to decide. Mr. Roskill seeks, in the first place, to bring it within the implied contract theory, or, failing that, he relies upon statements to be found in some recent cases asserting the existence of a general principle upon which a jus quaesitum tertio arising out of contract is recognised in English law.

As regards the implied contract theory, from what facts is any contract between the plaintiffs and the defendants to be implied? If, as in the *Elder Dempster* case,[16] A invites B to do something to A's goods which B is under no antecedent contractual duty to A to do, it may be reasonable to imply an agreement between A and B as to the terms on which that thing shall be done, and this is so whether or not the invitation is accompanied by a bailment of the goods by A to B, although such a bailment may make it easier to imply a contract. The fact that B is under a contractual duty to C, unenforceable by A, to do that very thing to A's goods does not prevent one implying a contract between A and B, although it may be relevant to the question whether any contract between A and B is to be implied and to its terms, if such a contract is to be implied. Whether or not the implication of such a contract from the special facts in the *Elder Dempster* case[16] was the real ratio decidendi of the majority of the House of Lords, this theory involves no novel principles of law. But it does involve an invitation (which I concede may be an implied invitation) by A to B in his own right to do something to A's goods, and not an invitation to B's principal, C, addressed to C through B as C's agent to accept the invitation.

In the present case, it does not seem to me that the plaintiffs ever invited the defendants to do anything to the plaintiff's goods. They were told by United States Lines to apply to the defendants for delivery of their goods. They did so; that is all. It was

[14] [1901] A.C. 495, 506; 17 T.L.R. 749.

[15] [1898] A.C. 1; 14 T.L.R. 125.

[16] [1924] A.C. 522.

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United States Lines who requested the defendants to handle the plaintiffs' goods, and United States Lines did so pursuant to their own contract with the defendants, with the object of performing, through the agency of the defendants, United States Lines' own contract with the plaintiffs. It would be flouting reality to suggest that such request to the defendants was made by United States Lines as agents for the plaintiffs, yet if it was not, I can see no ground upon which any contract between the plaintiffs and the defendants can be implied from the mere fact that United States Lines requested the defendants to handle the plaintiffs' goods and to deliver them to the plaintiffs upon the plaintiffs demanding them.

Mr. Roskill has insisted much that the defendants were sub-bailees of the goods of the plaintiffs at the time when the damage was caused. If the doctrine of sub-bailment is not too esoteric for my understanding, I take this to mean that United States Lines, being then entitled to possession of the plaintiffs' goods, transferred to the defendants such exclusive right of possession as would in the old days have entitled the defendants to sue in trover, and would even today entitle them to be prosecuted for the offence of larceny as a bailee instead of simple larceny. I doubt whether, on the facts, the defendants were ever bailees, whether sub, bald or simple, of the drum of chemicals, but as such possession as they had was given them by United States Lines and not by the plaintiffs, it seems to me quite immaterial whether they were or were not.

Where possession of goods is handed over by the cargo-owner himself (as was assumed to be the case in *Elder Dempster* [16]) the bailment of goods to the person to whom the goods are handed over may, as I have said, be one of the relevant circumstances from which a contract between the cargo-owner and that person may be implied; but I desire to guard myself against any suggestion that when a cargo-owning consignor, who has already made a contract of carriage with a shipowner whereby the shipowner undertakes the loading, delivers his goods to stevedores engaged by the shipowner in order that the goods may be loaded on the ship, any inference can be drawn that possession of the goods is handed over to the stevedores otherwise than as agents for the shipowner or that there is any invitation to the stevedores in their own right to load the cargo-owner's goods from which a contract between cargo-owner and stevedores can be implied.

It remains, finally, to deal with those recent statements of a general principle, laid down principally by Denning L.J. on which Mr. Roskill in the last resort relies. It is convenient to deal with them chronologically. The fountain head (if I may borrow a metaphor from the subject-matter of the case) is the judgment of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board.*[17] In that case (which I will call

[16] [1924] A.C. 522.

[17] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179.

"the *Snipes Hall* case") the learned Lord Justice enunciates the principle [18] that "a man who makes a deliberate promise which "is intended to be binding, that is to say, under seal or for good "consideration, must keep his promise: and the court will hold "him to it, not only at the suit of the party who gave the "consideration, but also at the suit of one who was not a party "to the contract, provided that it was made for his benefit and "he has sufficient interest to entitle him to enforce it."

The proviso makes this statement unexceptional and not particularly helpful to the defendants. Even assuming in their favour that the limitation of liability in the bill of lading was made for the defendants' benefit, although the bill of lading does not say so, the question would still remain whether the defendants have "sufficient interest to entitle" them "to enforce it."

What is a "sufficient interest" is not exhaustively defined in the *Snipes Hall* case,[19] but the examples given of the general principle all fall into a number of classes, of which three are covenants running with the land, contracts entered into by agents for undisclosed principals, and contracts entered into by trustees for third parties. So far there is nothing novel, although views might differ whether these three genera belonged to a common species. But there is a fourth class, defined broadly as "promises "expressly made in favour of an interested person."

With the greatest respect, the two twentieth century cases cited in support of the existence of this fourth class do not appear to me to support it, and one, *In re Schebsman*,[20] appears, if anything, to negative its existence, while the seventeenth century case cited, *Dutton* v. *Poole*,[21] which was referred to with approval as late as 1776 in *Martyn* v. *Hind*,[22] was, as I read it, based on the view that natural love and affection of parent for child was good consideration in law, a doctrine which, even if it had not been treated as overruled at least since 1861 (see *Tweddle* v. *Atkinson*[23]), would be of little assistance to the defendants in the present case.

The ground of the actual decision of the majority of the Court of Appeal in the *Snipes Hall* case [24] was that it was a case of a covenant running with the land, and as Denning L.J. himself so held, any exposition of a wider principle was unnecessary and, therefore, obiter.

Four years later in *White* v. *John Warwick & Co. Ltd.*[25] Denning L.J. treated the *Elder Dempster* case [26] as an example of the general principle to which he had referred in the *Snipes Hall* case.[27] The decision in the *Elder Dempster* case,[28] he

[18] [1949] 2 K.B. 514.
[19] [1949] 2 K.B. 500.
[20] [1944] Ch. 83, 103, 104; 60 T.L.R. 128; [1943] 2 All E.R. 768.
[21] (1677) 2 Lev. 210.
[22] 2 Cowp. 443.
[23] (1861) 1 B. & S. 393.
[24] [1949] 2 K.B. 500.
[25] [1953] 1 W.L.R. 1285; [1953] 2 All E.R. 1021.
[26] [1924] A.C. 522.
[27] [1949] 2 K.B. 500.
[28] [1924] A.C. 522.

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said,[29] "was that when a party to a contract has deliberately in "plain words agreed to exempt a third party from negligence, "intending that the third party should have the benefit of the "exemption, he cannot go back on his plighted word and dis-"regard the exemption."

If one disregards the adverb and adjectives, which were, I think, intended to convey moral overtones rather than to qualify the legal principle, which appears to state the broad proposition that where a person has entered into a contract with another, intending to benefit a third person who is not a party to that contract and has expressed that intention in the contract, that third person can sue him on the contract to enforce the benefit, I do not think, for the reasons that I have already given, the *Elder Dempster* case[30] decided any such thing, which seems to me, with respect, to be even wider than the general principle as enunciated by the Lord Justice in the *Snipes Hall* case.[31]

White v. *John Warwick & Co. Ltd.*[32] was a case between the immediate parties to a contract. Denning L.J.'s observations which I have cited were expressly obiter. They are contrary to the opinions of Jenkins and Morris L.JJ. in *Adler* v. *Dickson*,[33] and I should have thought, with great respect, in direct conflict with the decision of the Court of Appeal in *Cosgrove* v. *Horsfall*,[34] where the successful plaintiff had, in plain words, agreed in a contract with the London Passenger Transport Board to exempt the defendant, who was not a party to the contract, from liability.

In the following year, in *Adler* v. *Dickson*[35] itself, Denning L.J. expressed the view that the cases on carriage of goods "undoubtedly show that when a carrier issues a bill of lading for "goods the exception clauses therein enure for the benefit, not "only of the carrier himself, but also for the benefit of the ship-"owner, the master, the stevedores and any other persons who "may be engaged in carrying out the services provided for by "the contract." For this statement, which was no doubt correct in 1954 if the Australian and United States cases were treated as authoritative, he cited the *Elder Dempster* case,[36] two Australian cases[37] which have since been overruled by the High Court of Australia, and two United States cases[38] which were overruled last week by the Supreme Court of the United States.

But Denning L.J. treated the position of the stevedores not as governed by any ratio decidendi which he discerned in the speeches in the House of Lords in the *Elder Dempster* case, but as an example of the general principle laid down in his own

[29] [1953] 1 W.L.R. 1285, 1294.
[30] [1924] A.C. 522.
[31] [1949] 2 K.B. 500.
[32] [1953] 1 W.L.R. 1285.
[33] [1955] 1 Q.B. 158.
[34] (1945) 62 T.L.R. 140.
[35] [1955] 1 Q.B. 158, 181.
[36] [1924] A.C. 522.
[37] *Gilbert Stokes & Kerr Pty.* v. *Dalgety & Co.* (1948) 81 Ll.L.R. 337; *Waters Trading Co.* v. *Dalgety & Co.* [1951] 2 Lloyd's Rep. 385.
[38] *Collins & Co.* v. *Panama Railway Co.* [1952] A.M.C. 2054; *Ford* v. *Jarka* [1954] A.M.C. 1095.

judgment in the *Snipes Hall* case.[39] He said[40]: "The reason "why the stevedores and others are protected is because although "they were not parties to the contract, nevertheless they parti-"cipated in the performance of it, and the exception clause was "made for their benefit whilst they were so performing it. The "clause was not made expressly for their benefit, it is true, but "nevertheless it was by necessary implication, which is just as "good: and they have sufficient interest to entitle them to "enforce it. Their interest lies in this: They participated in it "in so far as it affected them and can take those benefits of it "which appertain to their interest therein."

The last sentence, at first sight, makes the general principle first laid down in the *Snipes Hall* case[41] much more precise, and that laid down in *White* v. *John Warwick & Co. Ltd.*[42] more restricted, for it defines, as neither of those cases sought to do, outside the more conventional categories of covenants running with the land, contracts entered into by agents for undisclosed principals, and contracts entered into by trustees for third parties, what constitutes a sufficient interest to entitle a third person to enforce provisions of a contract to which he is not a party. But on analysis I doubt whether it carries the matter any further than the *Snipes Hall* case[43] and *White* v. *John Warwick & Co. Ltd.*,[44] since ex hypothesi the exemption clause relates only to the performance of the contract; no one not "participating" in its performance would be doing anything which fell within the terms of the exemption clause, and no other interest in the third party is indicated save that the exemption clause was made for his benefit. It seems to me to do no more than to re-assert, but not to explain or to qualify, the very broad proposition laid down by the same Lord Justice in *White* v. *John Warwick & Co. Ltd.*[44]

Denning L.J.'s observations in all three cases relied upon by Mr. Roskill were obiter. They seem to me, with great respect, to be in direct conflict with *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[45] and *Cosgrove* v. *Horsfall*,[46] both of which are binding upon me, and I do not think that I would be entitled to follow them, even if I were satisfied (as I am not) that the exemption clause in the bill of lading in the present case was expressly, or by necessary implication, made for the defendants' benefit.

I ought, finally, to refer briefly to a recent decision of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[47] The facts of that case were far removed from the present case, and the actual decision is readily explicable on the implied contract theory. Morris L.J. so treated it, I think, in *Adler* v. *Dickson*.[48]

[39] [1949] 2 K.B. 500.
[40] [1955] 1 Q.B. 158, 182, 183.
[41] [1949] 2 K.B. 500.
[42] [1953] 1 W.L.R. 1285.
[43] [1949] 2 K.B. 500.
[44] [1953] 1 W.L.R. 1285.
[45] [1915] A.C. 847.
[46] (1945) 62 T.L.R. 140.
[47] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.
[48] [1955] 1 Q.B. 158, 201.

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Diplock J.

It may be that this does not represent Devlin J.'s actual ratio decidendi, for he was obviously influenced by the earlier Australian and United States cases, which had not been then overruled. It does appear from his references to the *Snipes Hall* case [49] and *White* v. *John Warwick & Co. Ltd.*[50] that he treated the *Pyrene* case [51] as falling within the wide principle stated in the dicta of Denning L.J. which I have cited. I have already, however, given my reasons for thinking that there is no such wide principle recognised in English law.

I myself think that the present case is governed by the simple, fundamental, though no doubt old-fashioned, principles laid down by Lord Haldane and approved by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*,[52] and that the defendants cannot limit their liability to the plaintiffs in tort by relying upon a contract between the plaintiffs and a third party to which they were not parties, and for which they gave no consideration to the plaintiffs. If in so deciding I am differing from the views expressed obiter by such distinguished lawyers as Scrutton and Denning L.JJ., I am fortified by the knowledge that a similar conclusion has been reached by the High Court of Australia and the Supreme Court of the United States for reasons much better and, in the latter case, more succinctly expressed than my own.

There will be judgment for the plaintiffs.

Judgment for the plaintiffs for £593 12s. 2d. plus interest at 4 per cent.

Solicitors: *Ince & Co.; Hill, Dickinson & Co.*

J. D. P.

[49] [1949] 2 K.B. 500.
[50] [1953] 1 W.L.R. 1285.
[51] [1954] 2 Q.B. 402.
[52] [1915] A.C. 847.

[COURT OF APPEAL.]

C. A.

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March 24; *April* 20.

Hodson, Sellers and Willmer L.JJ.

BROWN *v.* BROWN.

Husband and Wife—Settlement—Variation—Post-nuptial settlement—Purchase of house by husband and wife as joint tenants on trust for sale—Whether a "settlement"—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 23–38—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

In October 1952 the parties, then husband and wife, purchased in fee simple a parcel of land and a house thereon. Clause 2 of the conveyance provided: "(a) The purchasers shall hold the said "property upon trust to sell the same with power to postpone the

"sale thereof and shall hold the net proceeds of sale and other "moneys applicable as capital and the net rents and profits thereof "until sale upon trust for themselves as joints tenants. (b) Until "the expiration of twenty-one years from the death of the last "survivor of the purchasers the trustees for the time being of this "deed shall have power to mortgage, charge, lease or otherwise "dispose of all or any part of the said property with all the powers "in that behalf of an absolute owner."

The parties were and continued to be the trustees. Part of the purchase price had been met by mortgage to a building society and by a loan, and both husband and wife had contributed towards repayment of the debt, the wife substantially.

In 1957 the wife was granted a divorce, and in December 1958 she applied under section 25 of the Matrimonial Causes Act, 1950, to the commissioner for an order varying the settlement comprised in the conveyance "by extinguishing the rights and interest and "powers of the respondent husband absolutely as if he were now "dead." The judge made no order, and the wife appealed, it being submitted that the conveyance was a post-nuptial settlement:—

Held, allowing the appeal, that the conveyance should be regarded as a settlement by the parties upon themselves as trustees, which by its terms created legal and beneficial interests such as to give it the attributes of a settlement; the matter would be remitted to the judge in order that he might exercise his discretionary jurisdiction.

Dictum of Denning J. in *Smith* v. *Smith* [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584, 586 applied.

Prescott v. *Fellowes* [1958] P. 260; [1958] 3 W.L.R. 288; [1958] 3 All E.R. 55 distinguished.

APPEAL from Judge Shepherd Q.C. sitting as a special commissioner in divorce at Bodmin.

The plaintiff, Mrs. M. E. V. Brown, having divorced her husband, sought the variation of a settlement comprised in a conveyance regarding land and a house thereon which she and her then husband had purchased and held in trust as joint tenants. She asked that his rights, interest and powers in the trust should be extinguished.

The district registrar suggested that if the judge decided to vary the settlement it might be appropriate to leave the legal estate vested in the wife and the husband, delete the trust in their favour as joint tenants beneficially, and substitute a trust for wife absolutely and order the husband to deliver possession to her.

The facts are fully set out in the headnote and judgment.

G. D. Petherick for the wife.

The husband neither appeared nor was represented.

Cases cited by counsel are referred to in the judgment.

Cur. adv. vult.

April 20. HODSON L.J. read the following judgment of the court. This is an appeal from a decision dated December 5, 1958,

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of Judge Shepherd who, upon a summons by the appellant, Mrs. Brown, for variation of a settlement, comprised in a conveyance dated October 20, 1952, between one Beatrice Greaves, as vendor, and the respondent and appellant as purchasers, made no order. The appellant had appeared by counsel, but the respondent has not appeared either by counsel or in person. The appellant and respondent, formerly husband and wife, were divorced by a decree absolute dated June 18, 1957.

By the conveyance the vendor, in consideration of the sum of £975, conveyed to the purchasers in fee simple a parcel of land and a house thereon at 22, New Street, Penzance. By clause 2 of the conveyance the purchasers declared as follows: "(a) The "purchasers shall hold the said property upon trust to sell the "same with power to postpone the sale thereof and shall hold "the net proceeds of sale and other moneys applicable as capital "and the net rents and profits thereof until sale upon trust for "themselves as joint tenants. (b) Until the expiration of twenty-"one years from the death of the last survivor of the purchasers "the trustee for the time being of this deed shall have power to "mortgage, charge, lease or otherwise dispose of all or any part "of the said property, with all the powers in that behalf of an "absolute owner."

The appellant and respondent were and are trustees of the property which is the subject-matter of the conveyance. By a mortgage of the same date, expressed to be supplemental to the conveyance, the purchasers obtained an advance of £540 upon a first mortgage to the Halifax Building Society. £235, part of the purchase price, was found by a loan at 4 per cent. interest made by Greaves, the vendor's husband. The balance was found by the parties out of their own resources.

When the summons was issued the building society had been paid £214 4s. by way of capital repayments, mortgage interest and costs, and £149 12s. had been paid to Greaves in respect of the loan. The appellant has contributed substantially towards these payments, especially towards those made to the building society, out of moneys which she earned by taking in paying guests and lodgers. Since the issue of the summons some further payments have been made to the building society and to Greaves.

The appellant's object in these proceedings is to obtain exclusive possession of the property so that she can earn her living as heretofore by taking in guests and lodgers. The jurisdiction of the court to vary settlements has recently been reviewed by the court in *Prescott* v. *Fellowes*,[1] where it was pointed out by Romer L.J.[2] that it has long been established by decisions binding on this court that a disposition of property may constitute a "settlement" for the purposes of section 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded

[1] [1958] P. 260; [1958] 3 W.L.R. 288; [1958] 3 All E.R. 55.

[2] [1958] P. 260, 281.

as a settlement of property for any other purpose. Attention was drawn to *Bosworthick* v. *Bosworthick*,[3] where a wife executed a bond which secured to her husband an annuity for his life. This court held that the bond was a post-nuptial settlement, and the words of Romer J., sitting as a member of this court, were cited. He said [4] that the authorities established "that where a husband "had made a provision for his wife or a wife for her husband in "the nature of periodical payments, that amounts to a settlement "within the meaning of the section."

The court thus has to deal with two classes of documents, not only deeds vesting property in trustees and creating successive, legal or beneficial interests, so as to have the attributes of a settlement familiar to conveyancers, but also other documents by which provision is made by one spouse for another, the commonest example of which is a deed of separation which usually provides for regular payments to be made by one spouse to the other during their separation. In *Prescott* v. *Fellowes* [5] it was held that the instrument in question fell into neither of these classes, and, accordingly, an out-and-out transfer of securities made by a wife to a husband in consideration of marriage was held not to be property settled over which the court could exercise its "variation" jurisdiction. It was there pointed out that it would be highly inconvenient, if not absurd, to hold all gifts made by one spouse to the other to be settlements, and it seems to us that it would be stretching the language of the section too far so to hold and thus to invite claims after divorce for the return, for example, of articles of clothing or personal adornment.

The court was in the course of argument in *Prescott* v. *Fellowes* [5] referred to a decision of Denning J. in *Smith* v. *Smith*,[6] which had stated the principle as the court thought too widely, so as to cover the transfer into a wife's name, not only of an annuity, but also of a "house or shares." This dictum was wide enough to cover the transfer of securities which had been made to the husband by the wife and had been followed by Stevenson J. at first instance in *Prescott* v. *Fellowes* but seemed to this court to be clearly at variance with what had been decided in *Hubbard* (*orse. Rogers*) v. *Hubbard*,[7] where there was an assignment by a husband to a trustee of a leasehold house (in which the parties lived together) with some furniture upon trust to assign the same to the wife absolutely. The trustee assigned the leasehold to the wife accordingly, but there was held not to be a settlement within the meaning of section 5 of the Matrimonial Causes Act, 1859, the predecessor of the section now in force.

The actual decision in *Smith's* case [8] was not directly in point in *Prescott* v. *Fellowes*,[9] for the property held to be settled

[3] [1927] P. 64; 42 T.L.R. 719.
[4] [1927] P. 64, 72.
[5] [1958] P. 260.
[6] [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584.
[7] [1901] P. 157.
[8] 61 T.L.R. 331.
[9] [1958] P. 260.

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property in the former case was, like the property in the present case, conveyed to the husband and the wife in fee simple upon trust to sell the same with power of discretion to postpone any sale "and to stand possessed" of the net proceeds of sale "and "of the net rents and profits until sale in trust for the husband "and wife as joint tenants beneficially." There was also, as here, a mortgage, but all repayments had been made before the decree. Neither *Smith's* case [10] nor the present case is the same as *Hubbard's* case,[11] where there was no joint tenancy and no trust for sale.

The question is: can the conveyance of October 20, 1952, truly be regarded as a settlement, or is it to be treated, as was the assignment in *Hubbard's* case,[11] as being outside the scope of the section? The position is, we think, made clear by the relevant sections of the Law of Property Act, 1925, ss. 23–38, the effect of which is summarised in the judgment of Denning J. in *Smith* v. *Smith* [12] in the following passage: "The result was "that the husband and wife held a joint tenancy of the legal "estate in the land (which could not be severed) and an equitable "joint tenancy in the income of the land pending sale and of "the proceeds eventually arising from the sale (which could be "severed by taking the appropriate steps). . . . So long as the "husband and wife were living in the house, they, of course, "shared the occupation and acquiesced in a postponement of "sale, and if they had continued in that way until one died the "survivor would take the whole legal and beneficial interest in it. "If they together let or sold the house, either of them could "sever the equitable joint tenancy in the income or proceeds, "whereupon each would be entitled to one half. No letting or "sale could, however, be effected by one without the consent of "the other, except by order of the Court of Chancery, which "would consider whether in the particular circumstances it was "right and proper that such an order should be made." Neither party has given any notice of severance, and so long as the power of sale is postponed, and there is no severance, the joint tenancy continues until one dies and the other takes the whole legal and beneficial interest on survivorship.

Without, therefore, resorting to the liberal construction of the word "settlement," which has been so much discussed in the authorities, it is, in our judgment, right to regard the conveyance here in question as a settlement by the parties upon themselves as trustees which by its terms created legal and beneficial interests such as to give it the attributes of a settlement. We respectfully agree, therefore, with that part of the judgment of Denning J. which deals solely with the instrument under his consideration.

Counsel contended that the fact that the mortgage payments were still continuing, and that various outgoings on the house

[10] 61 T.L.R. 331.
[11] [1901] P. 157.
[12] [1945] 1 All E.R. 584, 586; 61 T.L.R. 331.

had to be periodically met, gave the conveyance the attributes of a settlement within what we have called the liberal construction of the section, but we reject this argument seeing that none of these payments have to be made by virtue of the conveyance. The mortgage payments, which are the payments principally relied upon, are made, not under the conveyance, but under a separate instrument imposing obligations on the parties vis-à-vis the mortgagee.

We would therefore allow the appeal on the ground we have stated, and remit the matter to the learned judge in order that he may exercise his discretion, either in the manner indicated in the last paragraph of the report of the registrar or in some other manner as he thinks fit.

Appeal allowed.

Solicitors: *Corbin, Greener & Cook for Jewill, Hill & Bennett, Penzance.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

COGLEY *v.* SHERWOOD.
CAR HIRE GROUP (SKYPORT) LTD. *v.* SAME.
HOWE *v.* KAVANAUGH.
CAR HIRE GROUP (SKYPORT) LTD. *v.* SAME.

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April 21, 22.

Lord Parker C.J., Donovan and Salmon JJ.

Metropolis—Hackney carriage—"Plying for hire"—Hire car—Company operating service of hired cars at London Airport—Cars chauffeur driven—Available for use by passengers and public—Not licensed as hackney carriages—Cars advertised at desks where bookings made—No indication at standing places that cars available for hire—Whether "plying for hire"—Metropolitan Public Carriage Act, 1869 (32 *&* 33 *Vict. c.* 115), *s.* 7.

Judicial Precedent—Divisional Court decision—Whether binding on Divisional Court—Only if impossible to distinguish.

A car hire company, under a contract with the Ministry of Transport and Civil Aviation, operated a service of chauffeur-driven motor-cars at the North and Central terminals of London Airport, available day and night at a fixed schedule of fares, for the use of passengers and members of the public admitted to the airport by the Minister. The cars were not licensed as hackney carriages. Bookings were made at desks at each terminal, where the service was extensively advertised, but there was no indication at the standings where the cars waited that they were for hire, intending passengers being escorted to one of the cars by an employee of the company. On October 28, 1958, the respondents each hired a car for a short journey from London Airport, and subsequently the company and the two chauffeurs were convicted by justices on informations laid by the respondents, of offences under section 7 of the Metropolitan

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Public Carriage Act, 1869,[1] as being the owners and drivers of unlicensed hackney carriages unlawfully plying for hire:—

Held, that the words "plies for hire" in section 7 connoted some exhibition of the vehicle to the public as available for hire; that the cars in question were not exhibited to the public as being available for hire and, therefore, were not plying for hire within the meaning of section 7; and, accordingly, the justices had come to a wrong decision and the appeals must be allowed.

Griffin v. *Grey Coaches Ltd.* (1928) 45 T.L.R. 109 distinguished.

Allen v. *Tunbridge* (1871) L.R. 6 C.P. 481 approved in *Armstrong* v. *Ogle* [1926] 2 K.B. 438; *Clarke* v. *Stanford* (1871) L.R. 6 Q.B. 357 and *Gilbert* v. *McKay* [1946] 1 All E.R. 458 considered.

Semble, that although the words "plying for hire" must have the same meaning in relation to hackney and stage carriages, a stage carriage such as a coach or omnibus, may be exhibited, even if it is not on view when an intending passenger buys a ticket, if a schedule of regular services is advertised and a vehicle or vehicles has been regularly performing the services for some time in full view of the public.

Case stated by Middlesex justices sitting at Uxbridge.

On December 16, 1958, informations were laid by the respondent, Harry John Sherwood, against the appellant, Walter Joseph Cogley, and the appellant company, the Car Hire Group (Skyport) Ltd., alleging that Cogley was the driver and the appellant company the owners of an unlicensed hackney carriage which, on October 28, 1958, at North terminal, London Airport, unlawfully plied for hire, contrary to section 7 of the Metropolitan Public Carriage Act, 1869. Similar informations were laid by the respondent, John Lawrence Kavanaugh, against the appellant, William Howe, as the driver, and the appellant company, as the owners, of an unlicensed hackney carriage which, on the same date, from the Central terminal at London Airport, unlawfully plied for hire, contrary to section 7 of the Act. Both the respondents were taxi-drivers.

The justices heard the informations on January 19, 1959, and found the following facts: At London Airport there were two separate sets of buildings used for handling passengers, the Central and North terminals. The appellant company's business was to hire "self-drive" cars and also to hire cars with chauffeurs. The latter could be hired out on the spot or booked in advance. The major part of the company's business consisted of hiring cars with chauffeurs to persons who required immediate transport. The company conducted its business at both terminals. By virtue of a contract between the company and the Minister of Transport and Civil Aviation made on March 29, 1956, the company maintained and staffed at each terminal a desk at which the service they provided was well advertised. It appeared from photographs

[1] Metropolitan Public Carriage Act, 1869, s. 7: "If any unlicensed "hackney or stage carriage plies for "hire, the owner of such carriage shall "be liable to a penalty not exceeding "£5 for every day during which such "unlicensed carriage plies. . . . The "driver also shall in every such case "be liable to a like penalty unless he "proves that he was ignorant of the "fact of the carriage being an un-"licensed carriage."

exhibited to the case that at the front of each desk notices bearing the words "Book your car here" were displayed, and there were notices (similar at each desk) giving the name and address of the appellant company, and bearing the words "Official Car Hire "Service London Airport. Cars to all parts." The contract also provided, inter alia, that the company would provide at such times during the day and night as the Minister might require and at charges specified in the contract, car hire services at the airport for the benefit of travellers, users of the airport and such other persons as might be admitted thereto by the Minister; that the company would at its own expense take out and maintain all licences and policies of insurance necessary to the use of the vehicles, and at all times comply with all statutory or other requirements relating to the use of such vehicles; and that neither the company nor its servants should solicit custom at the airport. At each terminal the company used a standing for its vehicles appointed by the Minister which was conveniently placed so as to make the vehicles readily available to any member of the public who had hired a vehicle at the desk. In the case of the Central terminal the standing was a roadway to which the public did not have access. The standing places were so defined by marks on the roadway which were not easily seen when cars were parked there. The cars appeared to be private cars, and when standing at the appointed place would not give the appearance of being cars which were available for hire; and the uniform worn by the drivers was similar to that of private chauffeurs.

In addition to the notices displayed at both the company's desks, at Central terminal there were advertisements in other parts of the main concourse and facilities for telephoning the desk from other parts of the building, and at North terminal inside the customs area there was a push-button on the wall labelled "Car "hire. Push." When the button was pushed an employee of the company attended. The company's desks were so positioned as to be plainly visible to passengers arriving at either the Central or North terminals. The advertisements and notices displayed on the desks and elsewhere were a clear intimation to members of the public who were at the airport that the services which the company provided were available for their use if desired.

With the admitted object of obtaining evidence on which to base these proceedings, on October 28, 1958, the respondents arranged for two of the company's cars to be hired, one from the Central terminal and one from North terminal. In both cases the intending car passengers desired to hire a private car from the company and approached the desks and asked to be driven to Twickenham from the North terminal and Richmond from the Central terminal respectively. At the North terminal the clerk at the desk wrote on a printed form the name of the driver and the reference number of the car. The passenger was escorted to a waiting car owned by the company and driven to Twickenham by the appellant, Cogley. At the Central terminal, the desk clerk

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made entries in a book and the passenger was escorted to a waiting car owned by the company and was driven to Richmond by the appellant, Howe. Both passengers were asked for and paid to the driver a fare representing three shillings per mile for the journey. The two cars used for the journeys to Twickenham and Richmond on the day in question were not licensed as hackney carriages.

It was contended by the appellants and the appellant company (a) that the two cars were not exhibited to intended passengers as being for hire or at all and there was no solicitation of intending passengers in any shape or form, and that the advertisements at the desks could not be treated as solicitation within the context of the statute; (b) that for a "plying for hire" to exist there must be a solicitation by words or conduct by either the driver or the person in charge of the vehicle of persons who had not entered into a prior contract; (c) that the solicitation of the public involved in plying for hire must be in relation to a particular vehicle; and (d) that the evidence showed that not until after the contract was made at the desk was the car or the driver selected for the journey.

It was contended by the respondents that (a) "hackney "carriage" was defined by section 4 of the Metropolitan Public Carriage Act, 1869, as "a carriage for the conveyance of pas- "sengers which plies for hire within the limits of this Act, and is "not a stage carriage." The limits of the Act were the Metropolitan Police District, the City of London and the liberties thereof. London Airport was within the Metropolitan Police District and the Act accordingly applied; (b) "plying for hire" really meant carrying out the business of carrying passengers for hire or reward: that by applying the principles of common sense the evidence showed that the cars in question were in fact acting as taxi-cabs and that as the cars were not licensed as hackney carriages the offences alleged had been committed.

The justices, having referred to section 4 of the Act, decided that London Airport was within the limits of the Act and the vehicles concerned were clearly "carriages for the conveyance of "passengers," were not stage carriages, and were not licensed as hackney carriages. Their decision accordingly rested on their finding whether or not the vehicles were "plying for hire." They considered all the cases quoted to them and failed to extract therefrom a comprehensive and authoritative definition of "plying for "hire." Whatever such a definition might be, they expressed the view that it must include a solicitation of the public to be forthwith conveyed in a carriage which was "readily" available to an agreed destination for an agreed fare. On the authorities, it appeared to them that the solicitation might be not only by words but by the exhibition of the vehicles, public display of advertisements, or a combination of both, and, in their opinion, any acts, words, notices or conduct which brought to the notice of a member

of the public that a vehicle was readily available to transport him to his destination on payment of a fare. The fact that a vehicle was on view had, in their opinion, merely a high evidential value and was not an essential condition of plying for hire. Indeed, it was not necessary that at the time that the agreement was reached by the hirer and the passenger for the passenger's conveyance that the actual driver or the vehicle to be used was known (*Griffin* v. *Grey Coaches Ltd.*[2]).

The justices rejected a submission that on the authority of *Hunt* v. *Morgan*[3] a vehicle could, in law, only ply for hire if it was standing on a properly authorised rank or was stationary in a public street. They took the view that the ratio decidendi of *Hunt* v. *Morgan*[3] was not what constituted "plying for hire" but what was "a place" at which a hackney carriage which was in fact plying for hire was compelled to accept a fare. They considered that the facts in *Griffin* v. *Grey Coaches Ltd.*[4] and the present cases had two substantial similarities: in both cases the existence of the service offered to the public was made known by advertisement, and the vehicle used was not on view or allocated to the particular journey at the time the agreement for the journey was made. They came to the conclusion that a part of the company's ordinary business was to provide transport immediately on request for a fare. To do so the company kept cars and drivers at a reasonably accessible place ready for immediate use. The company offered its services to the public at London Airport by manning desks on which were displayed notices and advertisements at the place where they were most likely to be seen by the passengers arriving by air and, indeed, did their best to advertise their services. In the justices' opinion that constituted a solicitation of the public to hire the company's cars which were immediately available and, accordingly, they decided that the company's vehicles were plying for hire. They convicted the appellants and the appellant company of the offences charged and ordered their absolute discharge. They ordered the company to pay £12 12s. costs. The appellants and the appellant company appealed.

The question for the opinion of the court was whether or not the justices were right in law in finding that the vehicles in question were "plying for hire."

Neil Lawson Q.C. and *W. A. Macpherson* for the appellants and the appellant company.

James Borders for the respondents.

J. R. Cumming-Bruce intervening for the Ministry of Transport and Civil Aviation.

[2] 45 T.L.R. 109.
[3] [1949] 1 K.B. 233.
[4] 45 T.L.R. 109.

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The following cases, other than those referred to in the judgment, were cited in argument: *Foinett* v. *Clark*[5]; *Sales* v. *Lake*[6]; *Leonard* v. *Western Services Ltd.*[7]; *Skinner* v. *Usher*.[8]

Lord Parker C.J. This is an appeal by way of case stated by justices for the county of Middlesex sitting at Uxbridge, before whom four informations were preferred charging offences against section 7 of the Metropolitan Public Carriage Act, 1869, in that the appellants were respectively the owners and drivers of two unlicensed hackney carriages, which had unlawfully plied for hire. The justices, after very careful consideration of the authorities, felt constrained to hold that the offences were proved. They convicted the appellants accordingly, but gave them an absolute discharge, ordering in the case of the appellant company that it should pay 12 guineas costs. [His Lordship stated the facts and continued:]

The Metropolitan Public Carriage Act, 1869, provides, so far as it is relevant to these proceedings, by section 2 that: "The limits of this Act shall be the Metropolitan Police District "and the City of London and the liberties thereof." By section 4, which is the definition section, it is provided that: "In this Act "'stage carriage' shall mean any carriage for the conveyance "of passengers which plies for hire in any public street, road or "place within the limits of this Act, and in which the passengers "or any of them are charged to pay separate and distinct or at "the rate of separate and distinct fares for their respective places "or seats therein. 'Hackney carriage' shall mean any carriage "for the conveyance of passengers which plies for hire within the "limits of this Act, and is not a stage carriage." Finally, section 7 provides that: "If any unlicensed hackney or stage "carriage plies for hire, the owner of such carriage shall be liable "to a penalty not exceeding £5 for every day during which such "unlicensed carriage plies. . . ."

It is quite clear that London Airport is within the limits of the Act, and the only question therefore falling to be determined in these proceedings is whether either or both of the two cars were plying for hire. If they were, then they were clearly unlicensed, and an offence was committed.

The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage carriages. Those decisions are not easy to reconcile, and like the justices, with whom I have great sympathy, I have been unable to extract from them a comprehensive and authoritative definition of "plying for hire." One reason, of course, is that these cases all come before the court on case stated, and the question whether a particular vehicle is plying for hire, being largely one of degree

[5] (1877) 41 J.P. 359.
[6] [1922] 1 K.B. 553; 38 T.L.R. 336.
[7] [1927] 1 K.B. 702; 43 T.L.R. 131.
[8] (1872) L.R. 7 Q.B. 423.

and therefore of fact, has to be approached by considering whether there was evidence to support the justices' finding.

In those circumstances it was unnecessary, and clearly inadvisable, for the court to attempt to lay down an exhaustive definition. Indeed, that was specifically referred to by Lord Hewart C.J. in *Griffin* v. *Grey Coaches Ltd.*[1] in 1928. Lord Hewart C.J. said[2]: "In the course of the argument reference has "been made to a considerable number of cases, and attention "has been directed to the occasional narrowness of the field of "argument and decision in those cases. But it is to be observed "that cases on this interesting question of plying for hire usually "turn upon the question whether there was or was not evidence "in the particular facts of the case justifying the conclusion "arrived at by the justices. Nowhere is there any attempt to "formulate an exhaustive definition of the meaning of the term "'plying for hire.'"

I think the proper course is to start with the words of the Act and to construe them, before seeing whether there are any decisions binding upon us which constrain us to put a different construction upon the words. Approaching the matter in this way, the first thing that strikes one is that the Act is dealing with carriages plying for hire, not with persons carrying on the business of letting out carriages. It is the carriage that must ply for hire, and, though a human agency must clearly be involved, the Act is directing one's attention to the carriage under consideration and posing the question: is *it* plying for hire? While no doubt in 1869 persons were engaged in letting out carriages on hire, the legislature clearly could not then envisage the considerable business which has grown up of recent years of hiring out cars. Indeed today, as a matter of common sense, I do not think that anyone would say that vehicles belonging to the many car hire concerns are plying for hire in the ordinary sense of the word. It seems to me that the Act is prima facie dealing with a particular carriage whose owner or driver invites the public to be conveyed in it.

The idea is well set out by Montague Smith J. in *Allen* v. *Tunbridge*,[3] where he says[4]: "I am of the same opinion upon "the authority of the case in the Queen's Bench. It appears "to have been held there that, if the proprietor of a carriage "sends it to a place for the purpose of picking up passengers, "that is a plying for hire within the Act. That is very different "from a customer going to a job-master to hire a carriage."

Indeed that passage was approved in *Armstrong* v. *Ogle*.[5] In that case Lord Hewart C.J. said[6]: "What is the principle "to be applied? It was stated in a single sentence by Montague "Smith J. in *Allen* v. *Tunbridge*[7] where he said (referring to a

[1] (1928) 45 T.L.R. 109.
[2] Ibid. 110.
[3] (1871) L.R. 6 C.P. 481.
[4] Ibid. 485.
[5] [1926] 2 K.B. 438; 42 T.L.R. 553.
[6] [1926] 2 K.B. 438, 445.
[7] L.R. 6 C.P. 481, 485.

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"previous case): 'It appears to have been held there, that, if "'the proprietor of a carriage sends it to a place for the purpose "'of picking up passengers, that is a plying for hire within the "'Act. That is very different from a customer going to a job-"'master to hire a carriage'"; then Lord Hewart says [8]: "The "contrast is between a particular and definite private hiring and "a public picking up of passengers."

The decision in *Allen* v. *Tunbridge* [9] was a decision of the Court of Common Pleas, but the same idea is I think behind the contemporary decisions in the courts of Queen's Bench and the Court of Exchequer. Thus in *Case* v. *Storey* [10] Kelly C.B., in referring to the words "plying for hire" under a different Act, said [11]: "Those words must mean that the carriage is to be at "the disposal of any one of the public who may think fit to "hire it."

In *Clarke* v. *Stanford* [12] Cockburn C.J. said [13]: "But where "a person has a carriage ready for the conveyance of passengers, "in a place frequented by the public, he is plying for hire, al-"though the place is private property." Mellor J. said [14]: "But "what is the carriage there for? Though the driver makes no "sign, he is there to be hired by persons who arrive by train, "and there is no restriction as to the persons who, arriving by "train, shall hire the carriage; it is therefore plying for hire, "within the meaning of the statute." Lush J. said [15]: "This "carriage was awaiting the arrival of a train, in order to be hired "by any person who might come by the train. That is a plying "for hire within the meaning of this statute."

In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: "Before you hire my vehicle, you must take "a ticket at the office," aliter, if he said: "You cannot have "my vehicle but if you go to the office you will be able to get "a vehicle, not necessarily mine."

There are, however, some cases which point to a different conclusion. For my part, however, I find it unnecessary to go into them and for this reason. In all the cases where it has been held that a carriage was plying for hire, it was in fact there and on view. Thus, in *Gilbert* v. *McKay* [16] cars were held to be plying for hire even though, as I assume, a member of the public could not choose his vehicle, but be that as it may, the vehicles were clearly on view, they were standing, like taxis might stand

[8] [1926] 2 K.B. 438, 445.
[9] L.R. 6 C.P. 481.
[10] (1869) 4 Ex. 319.
[11] Ibid. 323.
[12] (1871) L.R. 6 Q.B. 357.
[13] Ibid. 359.
[14] Ibid. 360.
[15] Ibid.
[16] [1946] 1 All E.R. 458; 62 T.L.R. 226.

on a rank, outside offices bearing the sign "Cars for Hire." It is true that in that case it was suggested that there might be a plying for hire even if the cars were not on view, and the same appears in *Cavill* v. *Amos*,[17] where Channell J.,[18] in giving judgment, said: "In ordinary cases, in order that there should be "a plying for hire, the carriage itself should be exhibited. He "thought, however, that a man might possibly ply for hire with "a carriage without exhibiting it, by going about touting for "customers." For myself I think that it is of the essence of plying for hire that the carriage should be exhibited.

Here I think it is clear that the cars in question were not exhibited in this sense of the word. As I have said, the only cars that were on view were at one terminal, and to any ordinary member of the public they did not appear to be for hire; they appeared merely to be ordinary private cars with private chauffeurs.

It is said, however, that the cases concerning stage carriages and in particular the case of *Griffin* v. *Grey Coaches Ltd.*,[19] to which I have already referred, force one to a different conclusion. Indeed, I think it was that case that chiefly influenced the justices. Thus in setting out their reasons, they say this: "Indeed it is "not necessary that at the time the agreement is reached by the "hirer and the passenger for the passenger's conveyance that "the actual driver or the vehicle to be used is known (*Griffin* v. "*Grey Coaches Ltd.*[19])." A little later on they say: "We "considered that the facts in *Griffin* v. *Grey Coaches Ltd.*[19] and "the cases before us had two substantial similarities: in both "cases the existence of the service offered to the public was made "known by advertisement and the vehicle used was not on view "or allocated to the particular journey at the time the agreement "for the journey was made."

In *Griffin's* case,[19] which concerned a stage carriage, the company, Grey Coaches Ltd., were owners of motor charabancs, plying at regular hours between London and Brighton. The question was whether the vehicles were plying for hire at Brighton, in respect of which there was no licence. It appears that there were extensive advertisements exhibited at the office in Brighton advertising the times of departure of the charabancs, and tickets could be purchased at the office up to 10 minutes before the advertised time, but not afterwards. At the time when the tickets were purchased there was no charabanc in the garage adjoining the office, and it was not until 20 minutes later that the charabanc was driven up by one of the company's servants into the yard to take on the passengers. In the course of his judgment Lord Hewart C.J. said[20]: "What is the real difference, "apart from mere accidental difference, between that state of "affairs and the state of affairs which exists where the driver of

[17] (1899) 16 T.L.R. 156.
[18] Ibid. 157.
[19] 45 T.L.R. 109.
[20] Ibid. 111.

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"the coach, by gesture or by words, invites the members of the "public to board, and to travel upon, a vehicle which they can "see? It may be, as has been said, that the particular coach "was not then appropriated to the particular journey. It was "waiting to be appropriated; it was in a proper and convenient "place for that very purpose."

I do not think that that decision in regard to a stage carriage is compelling authority in the present case. This court, of course, treats itself as bound by its own decisions. There is, however, at present no appeal, and that being so, I do not think that the court should treat itself as bound by a previous decision unless there can be said to be no real distinction. It is true that "plying for hire" must have the same meaning whether applied to stage carriages or hackney carriages. In the former case, however, it may well be far easier to find a plying for hire. Indeed, where a schedule of regular services is advertised and a vehicle or vehicles has been performing those services for some time in full view of the public, there is something to be said for the view that they are exhibited in the sense that I have indicated, even though a particular vehicle is not on view when the ticket is bought. I do not think that *Griffin's* case [21] compels me to come to a conclusion in regard to hackney carriages different from that indicated earlier in this judgment.

In my judgment the justices were wrong in treating this case as indistinguishable from *Griffin's* case.[21] No conceivable blame attaches to them, and indeed the court is grateful for the clear reasoning set out in the case upon which their decision was based. I would allow this appeal.

DONOVAN J. The Lord Chief Justice has already quoted the definition of "hackney carriage" in section 4 of the Act of 1869, and I need not repeat it. Section 6 gives the Secretary of State power to license to ply for hire both stage carriages and hackney carriages within the territorial limits of the Act, namely, the Metropolitan Police District and the City of London and the liberties thereof. Section 9 gives him power to make regulations, inter alia, for fixing the stands of hackney carriages; section 7 provides that if any unlicensed hackney carriage plies for hire or uses one of the fixed stands, the owner is liable to a continuing penalty.

The motor-cars concerned in the present case are hackney carriages within the definition in section 4, and London Airport is within the territorial limits of the Act. The sole issue is whether these cars, in the circumstances detailed in the case, "ply for hire" within the meaning of section 7.

[21] 45 T.L.R. 109.

When that section was enacted hackney carriages were, I suppose, solely horse-drawn, and indeed one meaning of the word "hackney" is "an ambling horse." The purpose of the Act of 1869 was clearly to exercise control over these vehicles so as to ensure a proper standard of safety and cleanliness, and of competency in their drivers, for the driver had to be licensed too under section 9. The motor-car has now displaced the horse carriage and the competence, at any rate, of the driver is ensured, so far as it can be, by other legislation. In addition, a very large business has grown up of private hire of motor-cars. These new conditions do not mean that plain words in the statute are now to be given something other than a plain meaning. They do, however, in my view involve that when the court is asked to apply the language of 1869 to the vastly different circumstances of 1959, then a very close scrutiny of the words is called for.

The expression "ply for hire" is not defined in the statute, and I would respectfully concur in the justices' finding that no comprehensive definition is to be found in the decided cases. But the term does connote in my view some exhibition of the vehicle to potential hirers as a vehicle which may be hired. One can perhaps best explain the reason by taking an example. It is a fairly common sight today to see in smaller towns and villages a notice in the window of a private house "Car for Hire." If the car in question is locked up in the owner's garage adjacent to the house, it could not in my view reasonably be said that at that moment the car was "plying for hire." If a customer wishes to hire it, he comes and makes his terms with the owner. On the return journey the owner might exhibit a sign on its windscreen, as some of them do, "Taxi" and then clearly he would be plying for hire. Similarly, if he left the car outside his house, the same notice on the car would involve, I think, that the car was then plying for hire, and the notice in the window might also then have the same effect.

The essential difference in the circumstances that I have compared is that in the one case the car is not exhibited at all, whereas in the other it is, coupled with the notification that it may be hired. I am fortified in suggesting a test of exhibition by several considerations. The first is that there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers. In *Gilbert* v. *MacKay*[22] the cars were just outside the premises of the car hire firm, which bore advertisements that cars were for hire.

Secondly, in section 7, the words are: "If any unlicensed . . .

[22] [1946] 1 All E.R. 458.

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"carriage plies for hire," thus indicating that one is to look and see what the vehicle itself is doing, albeit under human agency. I find it very difficult to say that a vehicle which is not exhibited in some way is a vehicle plying for hire. Like my Lord, I do not regard the decision in *Griffin* v. *Grey Coaches Ltd.*[23] as antagonistic to this view. There it is true that the charabanc was not on view at the time that the passenger booked his seat. But the court was dealing with a regular service at regular times along a regular route. One can, I think, exhibit a vehicle such as an omnibus or a charabanc just as effectively for the purpose of hire in this way as by any other. By these means it will come to the notice of prospective customers, which after all is the object of exhibition.

The court is dealing in this case with two particular vehicles, one engaged from the Central terminal, and one from the North terminal of London Airport. The case finds that at the Central terminal the cars stood while waiting to be hired on a roadway to which the public had no access. There is no such precise finding, I think, as to the situation of the standing at the North terminal, but there is certainly no evidence that at either standing there was any notice that the cars, or any of them, were for hire. This, no doubt, explains the contention put in the forefront of the appellants' case, namely, that the two cars were not exhibited to intended passengers, or at all. This is not met by any opposing contention on the part of the respondents. The justices appear to deal with the case on the footing that the cars were not on view, for they say in effect that, despite this, the decision in *Griffin* v. *Grey Coaches Ltd.*[23] compelled them to the conclusion that this circumstance was inconclusive.

I have already stated why, in my view, the charabancs concerned in that case were in fact on view. If, then, the two cars with which this case is concerned were not exhibited to the public as being available for hire, I think it is wrong to say of these vehicles that they were then hackney carriages "plying for "hire."

The respondents' main contention begins in this way: plying for hire really means carrying out the business of carrying passengers for hire or reward. With respect I think this suggested definition is misleading. The business is carried on by the owners of the cars and section 7 is not designed to regulate that business as such. It deals with the vehicle itself, and enacts that the vehicle shall not, if unlicensed, ply for hire. Of course the vehicle can do nothing except under human control, but the section is contemplating the function which the vehicle itself is fulfilling, albeit under human control, at a particular time.

I do not find it possible to say that a hackney carriage not on view to the public is, when not so on view, plying for hire,

[23] 45 T.L.R. 109.

particularly when at the same time there is no indication in or around it that it ever does such work. I agree with the judgment of the Lord Chief Justice, and, accordingly, like him, I would allow this appeal.

Salmon J. I also agree, although not without some doubt, that, for the reasons stated by my Lord, this appeal should be allowed. Such doubt as I feel springs not from the words of the statute, which appear to me to be reasonably plain, but from the multifarious decisions upon it. If the matter were res integra, I should have thought that it was obvious that the words "plying for hire" have a meaning different from and narrower than "letting for hire" or "carrying on a private hire business." But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle.

In cases such as these, the member of the public knows nothing, and has no time to make any inquiry about, the vehicle or the standing or, indeed, the identity of the owner. It is not surprising that in such cases Parliament should make arrangements that the vehicles which so ply for hire shall be of a certain standard of safety and comfort upon which the member of the public can rely.

But from time to time in the past people owning vehicles which were plying for hire have exercised their ingenuity for circumventing the provisions of the Act of 1869, and on a large number of occasions this court has had to consider those attempts. During the course of the years, observations have been made which deal with the particular circumstances of a case, and these have been adopted and expanded in other cases; and so we have come to a position where, on the authorities, it is possible, as has been pointed out by Mr. Cumming-Bruce, to make a powerful argument, as Mr. Borders has done, for holding that this Act means something quite different from what any ordinary man would think that it meant on reading it.

Indeed, this court, to my mind, is driven to the very brink of saying that whenever a private hire firm has a fleet of motor-cars in its garage and advertises for customers, those motor-cars are plying for hire. That seems to me to be quite wrong. It was never within the contemplation of the legislature that the job-master (who was the counterpart in 1869 of the car hire service of 1959), should be within the Act, as was pointed out by Montague Smith J. in *Allen* v. *Tunbridge*[24] as long ago as 1871. I do not feel that we are constrained by authority to cross the brink. Although authority precludes a finding that the making of a present open offer is a necessary part of "plying for hire." I do not feel

[24] L.R. 6 C.P. 481.

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compelled by any authority to find that a vehicle plies for hire unless it is exhibited. In this case the vehicles were not, as my Lords have pointed out, exhibited, and for that reason I agree that this appeal should be allowed.

Appeal allowed.
Order for costs made by justices to be discharged.
No other order as to costs.

Solicitors: *Coward, Chance & Co.; Alexander Charles, Leytonstone; Treasury Solicitor.*

E. M. W.

[QUEEN'S BENCH DIVISION.]

1959
April 30.

Lord Parker C.J., Donovan and Salmon JJ.

PENDER and Others *v.* SMITH.

Licensing—Licensed premises—Intoxicating liquor taken from premises—"Take from"—Crate of liquor deposited on floor in entrance hall of licensed premises—Intention to remove crate into highway—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 100 (1) (*b*).

By the Licensing Act, 1953, s. 100 (1) ". . . no person shall, "except during the permitted hours . . . (*b*) . . . take from, any "[licensed] premises any intoxicating liquor."

During the permitted hours the defendants bought a crate of beer in the off-licence portion of licensed premises and took it into the smoke-room of the premises. After the close of the permitted hours they were carrying the crate from the smoke-room into the entrance hall of the licenced premises when police officers intervened and caused them to deposit it on the floor of the hall. It had been their intention to remove the crate from the licensed premises into the highway and they would have done so if the police officers had not intervened. The defendants were convicted upon informations alleging that, outside the permitted hours, they did take from the licensed premises intoxicating liquor contrary to section 100 of the Licensing Act, 1953. On appeal:—

Held, that the words "take from" in section 100 (1) (*b*) of the Licensing Act, 1953, connoted a completed act, and that there could be no offence in that respect until the intoxicating liquor was in fact outside the licensed premises; accordingly the defendants were not guilty of the offence charged

Case stated by the judge of the Liverpool Crown Court sitting as recorder.

The defendants, John Pender, Thomas Pender, Peter Jackson and James Wesley Mawer, appealed to the recorder of Liverpool against their conviction, by the Liverpool stipendiary magistrate, on informations laid by the deputy chief constable of Liverpool

alleging that each of them, on July 5, 1958, at 10.23 p.m., a time not during permitted hours within the meaning of the Licensing Act, 1953, did take from licensed premises, The Bow and Arrow Hotel, Mab Lane, Liverpool, certain intoxicating liquor, namely, beer and stout, contrary to section 100 of the Licensing Act, 1953.[1]

The following were among the facts found by the recorder. On July 5, 1958, the permitted hours within the meaning of the Licensing Act, 1953, ended at 10 p.m. The Bow and Arrow Hotel, licensed premises within the provisions of the Act of 1953, consisted of substantial premises with the main entrance leading from a forecourt on the northern side, on which side, and on the eastern extremity of the same, was a self-contained portion of the premises set aside for the sale of intoxicating liquor for consumption off the premises and licensed for that purpose. To the left of the main hall, which was part of the licensed premises, and approximately five feet from the main entrance itself, was the smoke-room, entry to which was gained through a doorway two feet nine inches wide, the door having a return spring fitted to it so that it could not remain open without being held open. At some time prior to 10 p.m. on the evening of the day in question the defendants, or some of them, bought in the off-licence portion of the Bow and Arrow Hotel a crate containing two dozen bottles of beer and stout and carried it to the smoke-room. At approximately 10.23 p.m. two of them, Thomas Pender and Peter Jackson, were carrying the crate of beer from the smoke-room into the entrance hall, accompanied by the other two, when two police officers entered the entrance hall, and after the crate of beer had been carried through the doorway into the main entrance hall caused the crate to be deposited on the floor of the hall. It was the intention of each of the four defendants to remove the crate at that time from the premises into the highway and that purpose would have been accomplished by them as a concerted act had not the police intervened.

It was contended for the defendants that to be convicted of the offence with which each of them was charged it had to be proved and found that the crate of beer had been taken from the licensed premises in the sense that it had been physically removed beyond the boundaries of the premises and not merely moved within the boundaries thereof; that it was not an offence in English criminal law to attempt to commit the crime with which they were charged; that if that contention was wrong in law they could not be convicted of an attempt to commit the offence charged on appeal from their conviction by the magistrate; and that, in any event, only Thomas Pender and Peter Jackson could

[1] Licensing Act, 1953, s. 100: "(1) ". . . no person shall, except during "the permitted hours (*a*) . . . sell or "supply to any person in any licensed "premises . . . any intoxicating "liquor . . . or (*b*) consume in, or "take from, any such premises any "intoxicating liquor."

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be convicted of the offence charged and that the other two defendants could not so be convicted.

It was contended for the prosecution that the defendants were acting in concert in taking the crate of beer from the licensed premises and that those who were not actually and physically carrying it were present aiding, abetting, counselling and procuring the commission of an offence by those actually and physically carrying the crate; that the words "take from" in section 100 of the Licensing Act, 1953, which were contrasted with "consume in" referred to a present act of taking and did not require that act to have been completed by the removal of the intoxicating liquor from the licensed premises to the exterior thereof; that the offence with which the defendants were charged was a misdemeanour and that on the facts it was open to the magistrate's court to convict them of an attempt to commit the offence as an alternative to a conviction of committing the offence charged; and that if the judge of the Crown Court was not satisfied that the offence as charged had been committed it was open to him to vary the decision of the magistrate's court by convicting of an attempt to commit the offence charged.

The recorder came to the conclusion and found (1) that the defendants were acting in concert; (2) that the first contention of the defendants was wrong in law and that it was sufficient for a conviction of each of them of the offence with which each was charged for it to be proved and found that the crate of beer was being moved from within the boundaries of the licensed premises after the close of the permitted hours by the defendants acting together, it being their intention to carry the crate at that time from within the licensed premises and beyond the boundaries of the same; and (3) that there was a criminal offence of attempting to commit the offence charged and that, if he were wrong in his first finding, the defendants were each guilty of that offence and could be convicted of that offence although not charged therewith. He accordingly dismissed the appeals.

The defendants appealed.

Andrew Rankin for the defendants.

G. W. Guthrie Jones for the prosecutor.

No cases were cited in argument, but reference was made to the Shorter Oxford English Dictionary, Vol. II, p. 2124, sub nom. "Take," IX.

Lord Parker C.J. This is an appeal by way of case stated by the judge of the Crown Court at Liverpool sitting as recorder of that city, before whom the defendants appealed against their conviction by the stipendiary magistrate of Liverpool of an offence against section 100 of the Licensing Act, 1953. The recorder dismissed the appeal, holding that the offence was proved. Section 100 provides, so far as it is material here, that no person

shall, except during the permitted hours, "take from any such premises"—that is licensed premises—"any intoxicating liquor."

The short facts are these: the four defendants bought a crate of beer from the off-licence portion of the Bow and Arrow Hotel, Mab Lane, Liverpool. They did not remove it at once, but took it into the smoke-room of the hotel where they were going to continue drinking on the premises. They were minded ultimately to take the crate away and continue drinking somewhere else. At 10.23 p.m., licensing hours having ended at 10 p.m., they began to remove the crate, and they were in the process of taking it out of the smoke-room and into the entrance hall when two police officers entered.

The very short question in this case is whether in those circumstances the defendants can be said to have taken the crate "from any such premises," namely the hotel. For my part I do not propose to look at any dictionary or even to consider the various examples of the use of the words "take from," whether it be larceny from the person or taking a book out of a room or any such matters. It seems to me to be perfectly clear from the words used in the section that no offence is committed until the intoxicating liquor is taken from and gets outside the licensed premises. Accordingly, in my judgment, the police struck too soon and no substantive offence under the section was committed.

I should add that the recorder stated that if he were wrong in holding that the offence had been committed, he was satisfied, as indeed is clear, that there had been an attempt to commit the statutory offence and that he would be prepared to find the defendants guilty of that offence. That alternative has not been pursued in this court, if only for the reason that before the stipendiary magistrate the defendants were charged with the substantive offence and not with an attempt to commit an offence. There being no jurisdiction in the magistrate to convict of an alternative offence, namely of an attempt, even if that were possible, the matter cannot arise here. In my judgment this appeal must be allowed.

DONOVAN J. I agree. Mr. Guthrie Jones, whose task, if I may say so, excites my sympathy, has had to ask us to read "takes from" in section 100 as being equivalent to "found in "the process of taking from." One cannot read a penal section in that way. The words in section 100 in this respect, in their ordinary and natural meaning, refer to a completed act and to nothing else.

SALMON J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *John Hands & Son for John O. Cowper, Liverpool; Cree, Godfrey & Wood for T. Alker, Town Clerk, Liverpool.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1959
April 29.

Lord Parker C.J., Donovan and Salmon JJ.

REGINA *v.* ARUNDEL JUSTICES. *Ex parte* JACKSON.

Crown Practice — Certiorari — Jurisdiction of inferior tribunal — Justices acting in excess of jurisdiction—Disqualification from holding or obtaining driving licence—Period of disqualification in excess of maximum permitted by statute—Whether conviction must be quashed—Whether disqualification severable from conviction and sentence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12.

Road Traffic—Disqualification—Whether severable from conviction—Certiorari—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12.

The defendant was convicted by justices of driving a motor-vehicle on a road without due care and attention, contrary to section 12 of the Road Traffic Act, 1930, and was fined £20 and disqualified from holding or obtaining a driving licence for a period of 12 months. In fact it was the defendant's first conviction so that under section 12 (2) of the Act he was not liable to be disqualified for a longer period than one month. On an application by the defendant for an order of certiorari to quash the order of the justices adjudging him guilty and sentencing him, on the ground that it was made in excess of their jurisdiction:—

Held that, although the justices had exceeded their jurisdiction in disqualifying the defendant for a period of 12 months, the disqualification was supplemental to and severable from the conviction and sentence, and that, accordingly, the conviction should not be quashed but an order of certiorari would be made and only that part of the justices' order which provided for the disqualification quashed.

Reg. v. *Willesden Justices, ex parte Utley* [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838 distinguished.

APPLICATION for certiorari.

The applicant, Martin Burton Jackson, appeared before West Sussex justices sitting at Arundel on a charge of driving a motor-vehicle on a road without due care and attention contrary to section 12 of the Road Traffic Act, 1930, and pleaded not guilty to the charge. The justices convicted the applicant, and they imposed a fine of £20, disqualified him from holding or obtaining a driving licence for a period of twelve months and ordered that he pay certain costs.

The applicant, as he had informed the justices, had no previous convictions of any kind so that under section 12 (2) of the Act of 1930 [1] he was not liable to be disqualified for a longer period than one month, and he sought an order of certiorari to bring up and quash the order of the justices adjudging him guilty

[1] Road Traffic Act, 1930, s. 12 (as amended by the Road Traffic Act, 1934, s. 5 (2) and the Road Traffic Act, 1956, Schs. 8 and 9): "(1) If "any person drives a motor vehicle "on a road without due care and "attention . . . he shall be guilty of "an offence. (2) A first conviction "for an offence under this section "shall not render the offender liable "to be disqualified for a longer period "than one month."

and sentencing him on the ground that it was bad in law and was made without or in excess of jurisdiction.

J. Raymond Phillips for the applicant.

Anthony Harmsworth for the prosecutor.

The following cases were cited in argument: *Rex* v. *Willesden Justices, Ex parte Utley*[2]; *Reg.* v. *Droxford Justices, Ex parte Hale and Reg.* v. *Abergavenny Justices, Ex parte Murdoch*[3]; and *Reg.* v. *Shoreham-by-Sea Justices, Ex parte Purley.*[4]

LORD PARKER C.J. In this case Mr. Phillips moves for an order of certiorari directed to the justices of Arundel to quash a conviction whereby they adjudged the applicant to be guilty of driving a certain motor-vehicle on a certain road without due care and attention contrary to section 12 of the Road Traffic Act, 1930, fined him £20, disqualified him from holding or obtaining a driving licence for 12 months and ordered him to pay witnesses expenses of £4 2s. 6d.

The grounds of the application are that in making that order the justices exceeded their jurisdiction in that by section 12 of the Road Traffic Act, 1930, as amended by the Acts of 1934 and 1956, the maximum period of disqualification in the case of a first offence, as this was, is one month. That is undoubtedly true. The justices did exceed their jurisdiction, and the sole question is whether the court must therefore quash the whole of the order—conviction and sentence—or whether the disqualification is supplemental to the conviction, severable from it, so that the court need only quash the disqualification. It is perfectly clear that, to take this case, the fine of £20 and the conviction are not severable and if the fine of £20 had been in excess of the justices' jurisdiction then the whole order including the conviction would have to be quashed. That is the effect of *Rex* v. *Willesden Justices, Ex parte Utley.*[1]

In this case, however, the disqualification in question is really supplementary to the rest of the order and, without going into the reasons therefor, I need only say that the matter has been twice before this court, and in both cases this court has decided that that is the proper view and the court need only quash the disqualification. The cases are not fully reported, but they appear sufficiently from the Justice of the Peace Journal,[2] Vol. 117, at p. 177. In one of those cases Lord Goddard C.J. is reported to have said[3]: "The court therefore quashes the "order of disqualification. We do not quash the conviction or

[2] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.
[3] (1953) 117 J.P.J. 177, 178.
[4] [1955] Crim.L.R. 383.
[1] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.
[2] (1953) *Reg.* v. *Droxford Justices, ex parte Hale* and *Reg.* v. *Abergavenny Justices, ex parte Murdoch.*
[3] 117 J.P. 177, 178.

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"the penalty because section 6 (2) of the Road Traffic Act, 1930, "points out that the order for disqualification is different from "the conviction, and it expressly gives power to a disqualified "person to appeal against the order of disqualification as if it "were a conviction. That shows that it is something separate, "and it is perfectly easy to sever that part of the order which "deals with disqualification from that part of the justices' ad-"judication which deals with the penalty. We cannot, in "quashing the order for disqualification, substitute the right "period, but there is no reason why we should quash that part "of the order which deals with the penalty."

Accordingly, in my judgment, an order of certiorari must go and that part of the order which provides for a disqualification of 12 months must be quashed.

DONOVAN J. I agree.

SALMON J. I agree.

Order of certiorari accordingly.

Solicitors: *Chalton, Hubbard & Co. for Malcolm, Wilson & Cobby, Worthing; T. C. Hayward, Chichester.*

J. F. L.

[COURT OF APPEAL.]

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1959 *March* 11, 12, 13, 16; *April* 29.

Lord Jenkins, Morris and Ormerod L.JJ.

ADAMS AND OTHERS *v.* NATIONAL BANK OF GREECE AND ATHENS S.A.
PRUDENTIAL ASSURANCE CO. LTD. AND OTHERS *v.* SAME.

[1956 A. N. No. 1802. 1957 P. No. 982.]

Conflict of Laws—Foreign legislation—Foreign bank liable on English debt—Legislation by foreign State merging debtor bank with another bank in State of origin—New amalgamated bank "universal "successor" to rights and liabilities of former banks—Creditors' rights vested in English law—Subsequent foreign amending legislation retrospectively excepting obligation on English debt from universal succession—Whether a law governing succession or status—Whether confiscatory or discriminatory—Right of creditor to sue new bank.

Conflict of Laws—Succession—Corporation—Retrospective foreign legislation—Conflict of Laws—Confiscatory or political legislation. Conflict of Laws—Foreign legislation—Comity.

In 1927 a Greek mortgage bank issued sterling mortgage bonds repayable as to principal in 1957 with interest thereon meanwhile. The bonds were unconditionally guaranteed as to principal and interest by another Greek bank, and the proper law of the bonds and of the ancillary contract of guarantee was English law. In

1953 by an Act of the Government of Greece and by royal decree the guarantor bank and a third Greek bank (hitherto unconnected with the bonds) were amalgamated into a new banking company, the defendant company, and it was enacted that the new company was the "universal successor" to the rights and obligations of the amalgamated companies. In *National Bank of Greece and Athens S.A.* v. *Metliss* (infra) (proceedings instituted in December 1955 by a bondholder claiming arrears of interest against the defendants), it was held that the English courts would give effect to that decree as transferring to the defendants the liabilities of the guarantor bank. On July 16, 1956, the Greek Government passed a legislative decree amending the law and decree of 1953 so that the defendant company, as from the time of its creation, became the universal successor to the rights and obligations of the companies amalgamated "except for the obligation to which such companies were liable "whether as principal or guarantor . . . under bonds payable . . . "in gold or foreign currency, issued by limited liability companies." Under Greek law that decree had a retrospective effect and absolved the defendants from the obligations of the original guarantor bank in respect of the bonds.

On dates subsequent to July 16, 1956, a number of bondholders presented for payment coupons covering certain arrears of interest due under the bonds. Payment was refused by the mortgage bank and by the defendants. In an action by the bondholders against the defendants as guarantors under the bonds in which the defendants relied on the Greek decree of 1956 as a decree governing status which the English courts would recognise and the bondholders contended that that decree was a confiscatory or discriminatory foreign law to which English law would refuse to give effect:—

Held, (1) that the proper law of the bondholders' contract was English law which recognised the competence of the Greek legislature to pass the decree of 1956.

(2) That the decree of 1956 did not interfere with the bondholders' contractual rights, but its effect was to vary the status and attributes applied by Greek law to the defendants, in that it terminated their liability to assume the obligations for payment of the original guarantor bank; further, the decree was neither confiscatory nor discriminatory in its scope or of the nature of a penal or revenue law or such that English public policy could demand that it be not recognised, for it affected all bondholders alike, and that, accordingly, the plaintiffs' claim failed.

National Bank of Greece and Athens S.A. v. *Metliss* [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608, and *Lynch* v. *Paraguay Provisional Government* (1871) L.R. 2 P. & D. 268 considered.

Decision of Diplock J. [1958] 2 Q.B. 59; [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3 reversed.

APPEALS from Diplock J.[1]

On December 1, 1927, the National Mortgage Bank of Greece issued £2,000,000 7 per cent. sterling mortgage bonds, and the National Bank of Greece unconditionally guaranteed the due payment of the principal moneys and interest and the due performance of all the conditions of the bonds. Both banks were companies incorporated under Greek law. The bonds provided

[1] [1958] 2 Q.B. 59; [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3.

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that any question arising thereon should be settled by arbitration in London in accordance with the laws of England, and it was not disputed that the proper law of the bonds and of the ancillary contract of guarantee was English law. On December 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from 7 per cent. to $4\frac{3}{4}$ per cent., which modifications were agreed to by the guarantor.

On February 18, 1953, the Greek Government passed a law, Law No. 2292, which authorised the amalgamation or merger of banking companies, and provided, by section 4, that the company which absorbed another company by merger, or the new company formed by the amalgamation, "becomes the universal successor "to the rights and obligations in general of the amalgamated "companies, without any further formality or act whatsoever."

By a royal decree dated February 27, 1953, made under that law the National Bank of Greece and another Greek company, the Bank of Athens, were amalgamated and a new limited liability company, the National Bank of Greece and Athens S.A., the defendant company, was formed; by clause 5 of the decree the National Bank of Greece and the Bank of Athens ceased to exist, and the defendant company was "substituted ipso jure . . . in all "rights and obligations of the said amalgamated banks as their "universal successor." The effect of Law No. 2292 and the decree in Greek law was that the defendants succeeded to the liabilities of the National Bank of Greece S.A. as guarantor of the bonds.

In *National Bank of Greece and Athens S.A.* v. *Metliss* [2] in which a bondholder claimed against the defendants for arrears of interest due under the bond, it was held that the English courts would recognise and give effect to the Greek Law No. 2292 and the decree as transferring to the defendants the liabilities of the former National Bank of Greece S.A., and that, accordingly, the defendants were liable to the bondholder under the contract of guarantee.

On July 16, 1956, the Greek Government passed a legislative decree, No. 3504 substituting for the relevant paragraph of article 4 of Law No. 2292 of 1953, as from the time it entered into force, a paragraph whereby the company absorbing another company by amalgamation or the new company formed by the amalgamation became "the universal successor to the rights and obligations of "the companies amalgamated, except for the obligations to which "such companies were liable whether as principal or guarantor "or otherwise under bonds, securities in general or contracts "howsoever in relation to loans through bonds payable . . . in "gold or foreign currency, issued by limited liability companies ". . . the new company formed by the amalgamation shall not "be or be deemed by reason of this law or other law or decree or "articles of association . . . to be the successor to the above

[2] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

" obligations under loans in gold or foreign currency . . ." The legislative decree also abolished paragraph 5 of the royal decree of February, 1953, and provided that the rights and obligations of the defendant company were governed as from the time of its creation by the amended provisions of Law No. 2292. In Greek law that decree absolved the defendants from any liabilities as guarantors of the bonds in question, and was a decree to which the Greek courts would give retrospective effect.

On dates subsequent to July 16, 1956, a number of bondholders presented coupons covering interest due under the bonds since January 1, 1950, to the National Mortgage Bank of Greece for payment, and in August and September gave notice thereof to the defendants. Payment was refused by the mortgage bank and by the defendants and on September 17, 1956, and June 4, 1957, the bondholders issued the writs in these actions claiming the arrears of interest against the defendants as guarantors of the bonds. There was a third action (not referred to in the report below) relating to amounts of certain principal sums which became due on December 1, 1957, and to certain arrears of interest. That action was commenced by writ dated January 17, 1958. Certain matters which were raised at the hearing of the third action were not debated on appeal and the issues relating to the liability of the defendants were common to the three appeals.

At the trial the defendants contended, inter alia, that the liability alleged against them was governed by Greek law under which, by virtue of the Decree Law No. 3504 of 1956, they were not at the material times liable to the plaintiff bondholders under the guarantee. The plaintiffs, in reply, contended that it would be contrary to English public policy to give such or any effect to the Greek Decree Law No. 3504 on the ground that it was confiscatory and discriminatory in that it was enacted for the purpose of depriving a particular class of bondholders of rights of property vested in them immediately before such decree was passed.

The actions were heard together.

Diplock J. held that the decree of 1956 was not a law of succession or a law relating to capacity or status, but was in substance a law relating to the discharge of liabilities and altered rights which had vested in English law and as such was not, under English rules of private international law, effective to discharge the liability of the defendants to the plaintiffs as guarantors under the bonds and, accordingly, he gave judgment for the plaintiffs.

The defendants appealed.

T. G. Roche Q.C. and *N. H. Lever* for the defendants.

John Foster Q.C. and *Mark Littman* for the plaintiffs.

The following cases were cited in argument: *National Bank*

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of Greece and Athens S.A. v. *Metliss*[3]; *Anthony Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*[4]; *Lynch* v. *Paraguay Provisional Government*[5]; *In re Aganoor's Trusts*[6]; *Beavan* v. *Lord Hastings*[7]; *Huntington* v. *Attrill*[8]; *Government of India* v. *Taylor*[9]; *Foster* v. *Driscoll*[10]; *Regazzoni* v. *K. C. Sethia (1944) Ltd.*[11]; *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.*[12]; *Wolff* v. *Oxholm*[13]; *In re Fried Krupp Actien-Gesellschaft*[14]; *Onslow* v. *Corrie*[15]; *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Akt. & Hungarian General Credit Bank*[16]; *Nokes* v. *Doncaster Amalgamated Collieries*[17]; *Boguslawski* v. *Gdynia Ameryka Linie*[18]; *In re Claim by Helbert Wagg & Co. Ltd.*[19]

Cur. adv. vult.

April 29, 1959. LORD JENKINS. The judgment about to be read by Morris L.J. is the judgment of the court in these appeals.

MORRIS L.J. The question which is raised in these appeals is whether the appellant bank (the defendant company) is liable for the amounts of certain interest payments and principal sums which in the first instance became due from the National Mortgage Bank of Greece as principal debtors on dates subsequent to July 16, 1956. The amounts were due in respect of sterling mortgage bonds issued by that bank in 1927. Interest payments, on coupons duly presented, became due to various holders on dates between July 28, 1956, and August 22, 1956. One of the actions now under appeal relates to these amounts. That action was commenced by writ dated September 17, 1956. Another of the actions relates to interest payments which became due on dates subsequent to August 9, 1956. That action was commenced by writ dated June 4, 1957. A third action relates to the amounts of certain principal sums which became due on December 1, 1957, and to certain arrears of interest. That action was commenced by writ dated January 17, 1958. In each case the claims indorsed on the writs were expressed to be against the appellant bank "as guarantors." Certain matters which were raised at the hearing of the third action have not been debated in this court and the issues relating to the liability of the appellant bank are common to the three appeals.

[3] [1958] A.C. 509.
[4] (1890) 25 Q.B.D. 399; 6 T.L.R. 393.
[5] (1871) L.R. 2 P. & D. 268.
[6] (1895) 64 L.J.Ch. 521.
[7] (1856) 2 K. & J. 724.
[8] [1893] A.C. 150.
[9] [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292.
[10] [1929] 1 K.B. 470; 45 T.L.R. 185.
[11] [1958] A.C. 301; [1957] 3 W.L.R. 752; [1957] 3 All E.R. 286.
[12] [1921] 3 K.B. 532; 37 T.L.R. 777.
[13] (1817) 6 M. & S. 92.
[14] [1917] 2 Ch. 188.
[15] (1817) 2 Madd. 330.
[16] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.
[17] [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549.
[18] [1950] W.N. 335; [1950] 2 All E.R. 355.
[19] [1956] Ch. 323; [1956] 2 W.L.R. 183; [1956] 1 All E.R. 129.

The payment of the principal moneys and interest as they became due from the National Mortgage Bank of Greece had been guaranteed by the National Bank of Greece. The last-named bank no longer exists. The facts relating to the bonds and the circumstances under which the last-named bank came to be extinguished and the appellant bank came into existence are authoritatively recorded in the speech of Viscount Simonds in *National Bank of Greece and Athens S.A.* v. *Metliss*.[1] The National Mortgage Bank of Greece, the principal debtor, remains in existence but apparently does not flourish to an extent that has enabled it to pay the sums due. The significance of the date, July 16, 1956, is that Greek law was then changed as a result of the passing of Legislative Decree No. 3504. That decree was not in issue in the *Metliss* case.[2]

Decree No. 3504 amended the provisions of paragraph 2 of article 4 of Statute 2292 of 1953 and the amendment was to have retrospective effect. Decree No. 3504 further provided for the abolition of paragraph 5 of the royal decree of February 26/27, 1953. The provisions of Decree No. 3504 were as follows: "Article 1. Paragraph 2 of article 4 of Statute 2292/53 'on the "'amalgamation of limited liability banking companies' is "replaced as from the time it came into force with the following: "'The Company which has absorbed another company by amal- "'gamation or the new company created by amalgamation "'becomes the universal successor to the rights and obligations "'of the companies amalgamated without the necessity of any "'other formality or action, with the exception of the obligations "'of these companies as principal debtors, guarantors or for any "'other cause deriving from bonds, securities in general or con- "'tracts or any other cause and relating to loans in gold or "'foreign currency by bonds or otherwise payable to the bearer "'issued by the limited liability companies, juridical persons of "'public law, municipalities and communes, etc. The Company "'which has absorbed another company or is newly created by "'amalgamation does not acquire nor is it considered as having "'acquired by virtue of this present or other statute or decree "'or articles of association published in pursuance of this present "'law or in any other manner the above obligations deriving from "'loans in gold or foreign currency until a law is passed providing "'the extent and the manner in which they will become subject "'to these obligations.''

"Article 2: Paragraph 5 of Article Sole of the royal decree "dated February 26/27, 1953 'on the amalgamation of the "'National Bank of Greece and the Bank of Athens by the "'creation of a new limited liability banking Company' is "abolished as from the time of its publication. The rights and "obligations of the new limited liability banking company created

[1] [1958] A.C. 509; [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

[2] [1958] A.C. 509.

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"by the said decree under the name of 'National Bank of Greece "'and Athens S.A.' are governed as from the time the Company "was created by the relative provisions of Statute 2292/1953 as "amended by the present law."

"Article 3: The present comes into force as from its publica-"tion in the Government Gazette."

The effect of Legislative Decree No. 3504 was, therefore, that the rights and obligations of the appellant bank (which was created by the royal decree dated February 26/27, 1953, promulgated under the provisions of Statute No. 2292) were governed, as from the time that the appellant bank was created, by the relative provisions of Statute 2292 as amended by the Legislative Decree No. 3504. The result was that by legislation having retrospective effect there was no succession to the obligations of the National Bank of Greece as guarantors of the bonds with which this litigation is concerned.

The evidence showed that under Greek law, if the moratorium statutes were left out of account, the appellant bank would have been held liable as successors to the guarantors in respect of interest coupons presented before the passing of Decree No. 3504 in actions heard before the passing of such decree, but would not have been, nor would be, held liable in respect of coupons presented after such decree. Under Greek law, therefore, if the present claims had been put forward against the appellant bank in the Greek courts they would have failed even had there been no moratorium statutes in existence. Herein lies a difference between the claims now made and the claim made by Metliss which, had there been no moratorium statutes, could have been upheld in the Greek courts.

Upon what basis then are the present claims advanced in this country against the appellant bank? The answer to this must be sought by referring to the statements of claim. For convenience we refer to the statement of claim in the action commenced in 1956. Paragraphs 1–4 set out that the plaintiffs were the bearers of certain bonds, set out the terms and the modified terms of such bonds, and record that the National Bank of Greece had unconditionally guaranteed the due payment of the principal moneys and interest. Paragraphs 6 and 7 allege that the mortgage bank were in arrears with interest payments after coupons had been duly presented for payment and allege that notices had been given to the appellant bank who had not paid the amounts of the interest payments. The facts alleged in those paragraphs were all either proved or admitted. The basis of the claim against the appellant bank was put forward in paragraph 5 of the statement of claim as follows: "The defendants are a "corporation constituted under the laws of Greece and carrying "on business (inter alia) at 6, Old Jewry, E.C.2, in the County "of London. By a Greek Decree dated February 26, 1953, "and/or Article 4 of a Greek Act No. 2292 the entire assets and "liabilities of the National Bank of Greece (including their

"liability under the said guarantee) was transferred to the "defendants as the universal successor of the National Bank of "Greece." It was, however, proved in evidence that when the plaintiffs brought their action the appellant bank were not, by Greek law, liable to the plaintiffs. How then can the plaintiffs succeed? To advance upon the road to success they must place dependence upon Greek law. This is shown by the speeches of their Lordships in the *Metliss* case.[3] What the plaintiffs have done in the present actions is in the first place to assert and to rely upon Greek law but to set up Greek law in the form in which it was enacted in February, 1953, and which was to their advantage and to claim to be entitled to ignore the amendments to the Greek law made in July, 1956, which are to their disadvantage. The question raised in the appeals is whether so singular a process of selectiveness can be justified.

It seems to us that those who need recourse to Greek law must take it as they find it. If they assert that Greek law can endow, they must recognise that Greek law can disendow. If they aver that Greek law can create, they must accept that Greek law can change. If they need to have the foundation of Greek law upon which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is.

Though the proper law of the bondholders' contracts was English law and though therefore no foreign sovereign authority could vary the terms of the contracts, the bondholders must always have recognised that the existence of the Greek guaranteeing bank could be terminated by Greek law. If that happened the contract as such would not be altered though the guarantor would disappear. That was always a risk that the bondholders ran. The guaranteeing bank was extinguished by Greek law. A new Greek bank, the appellant bank, was created by Greek law. By Greek law it was given certain attributes and certain duties. One duty was to pay certain sums which the defunct bank as guarantor would have been liable to pay. The question raised in the *Metliss* case[4] was whether in a suit in England this obligation under Greek law could found a claim. Lord Simonds referred in his speech to the importance and novelty of the question raised, and he proceeded[5]: " . . . I am not aware of any "case, nor has the industry of counsel discovered one, in which "in the courts of this country a plaintiff has, without a plea of "novation or statutory assignment, recovered a sum due under a "contract from one who was not a party to that contract." Then later Viscount Simonds said[6]: "But, my Lords, in the "end and in the absence of authority binding this House, the "question is simply: What does justice demand in such a case "as this? I believe that justice will be done if your Lordships "think it right not only to recognise the fact that the new

[3] [1958] A.C. 509.
[4] Ibid.
[5] Ibid. 521.
[6] Ibid. 525.

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"company exists by the law of its being, but to recognise also "what it is by the same law. It is conceded that its status must "be recognised. That is a convenient word to use. But what "does it include or exclude? If a corporation exists for no other "purpose than to assume the assets, liabilities and powers of "another company, what sense is there in our recognising its "existence if we do not also recognise the purposes of its exist-"ence and give effect to them accordingly. If, for reasons of "comity, we recognise the new company as a juristic entity, "neither the Greek Government, the creator, nor the new com-"pany, its creature, can complain that we too clothe it with all "the attributes with which it has been invested. Thus and thus "alone, as it appears, justice will be done." Lord Tucker in his speech said [7]: "The identity of the old bank has become merged "in the amalgamation by a process which is by no means alien "to English legal conceptions. It is of the very essence of the "transaction that the liabilities and assets of the former should "attach to the latter, and to recognise the existence of the new "entity but to ignore an essential incident of its creation would "appear to me illogical. Why an English court should be com-"pelled to recognise that part of the decree which has extin-"guished the old bank but refuse to give effect to matters which "are of the essence of the process of amalgamation, I find it "difficult to understand. In my view, the fact that this liability "was attached to it at birth by its creator can properly be "regarded as a matter pertaining to the status of the appellant "company and accordingly governed by the law of its domicile."

But now, by reason of the passing of Decree No. 3504, the position is different. How then are the claims supported? The judge was of the opinion that the rights which the plaintiffs are seeking to enforce are contractual rights and are none the less so because the legal person against whom they seek to enforce them "was not originally a party to the contract but has been "substituted as a party by the operation of a law (albeit passed "by the Greek Government) which the English courts recognise "as effective to bring about the substitution." [8] But in our judgment the appellant bank has not been substituted as a party to the contract. In his speech in the *Metliss* case [9] Viscount Simonds pointed out that there was no plea of novation or statutory assignment and that novation could not be alleged. The relevant paragraph in the statement of claim in that action was as follows: "7. The defendants are a corporation constituted "under the laws of Greece and carrying on business inter alia "at 6 Old Jewry, E.C.2, in the County of London. By a Greek "Decree dated February 26, 1953, the entire assets and liabilities "of the National Bank of Greece (including their liability under "the said guarantee) were assigned and transferred to the "defendants."

[7] [1958] A.C. 509, 529.
[8] [1958] 2 Q.B. 59, 74.
[9] [1958] A.C. 509, 521, 522.

The contract of guarantee which was entered into by the National Bank of Greece was a contract to be governed by English law. The Greek Legislature could not alter the terms of that contract. The Greek Legislature could, however, terminate the existence of the guaranteeing bank. When it did so it created the appellant bank and charged it with the responsibilities of the defunct bank. That was fortunate for the bondholders for they could assert that though the appellant bank was a stranger so far as their contractual rights were concerned, yet by reason of the comity between States they could invite the English courts to recognise the status and the attributes of the new entity. Now it is said that Decree No. 3504 may be ignored because it is a foreign law which purports to discharge contractual liabilities. But there were no contractual liabilities as between the appellant bank and bondholders.

It was further held by the judge that after the appellant bank came into existence the bondholders acquired vested rights in English law as against the appellant bank and that the English courts ought not to give effect to any foreign legislation which purported to annul such vested rights. An examination of that conclusion need not depend upon considering the precise applicability of the word "vested." The position was that on various dates after July 16, 1956, the plaintiffs became contractually entitled to receive sums of money in the first place from the National Mortgage Bank of Greece and in the event of failure by that bank to pay, from the National Bank of Greece: if they had owned their bonds in the period between February 27, 1953, and July 16, 1956 (which they may or may not have done), they would have known that their rights as against the National Bank of Greece (if recourse to them as guarantors became necessary) would be unavailing for the reason that that bank had ceased to exist: they would, however, in that period, in the event of default by the National Mortgage Bank of Greece, have been able to sue the appellant bank in England for amounts becoming due in that period. But the basis of their potential claims against the appellant bank was that which is laid down in the *Metliss* case.[10] In the period before July 16, 1956, bondholders would, in respect of amounts to become due in the future (assuming they knew the law), have looked forward to the expectation of being able, if need be, to claim in the future against the appellant bank. But that would be on the assumption that Greek law remained as it was.

It seems to us that if it is alleged that a foreign company has the status of a successor to another foreign company so as to make it liable to pay a particular debt which would have been payable by the old company under a contract, it becomes a question of fact as to whether the foreign law did at the material

[10] [1958] A.C. 509.

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time bestow such a status. When Greek law was changed by Decree 3504 the effect, so far as bondholders were concerned, was to remove the prop of Greek law upon which they could have hoped to have founded claims against the appellant bank. It does not seem to us that an English court could any more refuse to recognise the fact of a change in Greek law than it could refuse to pay attention to any other relevant fact.

The fact that Decree 3504 was made retrospective is not of consequence in these appeals, which relate to amounts which became due after the passing of Decree 3504. It might be, though this possibility does not affect any question of liability, that some of the plaintiff bondholders only became owners of their bonds after the passing of the Decree.

It is said that Decree 3504 is not a law of succession and that as it was passed after the appellant bank came into existence it should in any event not be recognised as a law of succession as regards the appellant bank. It is further said that it does not become a law of succession by being made retrospective. We do not derive assistance from the attempt to apply to Decree 3504 some label of precise description. Decree 3504 seems, at least so far as Article 1 is concerned, to be a general law which, modifying Law 2292, was to be of general application to company amalgamations. But whether "law of succession" is or is not the appropriate description, the decree does in our judgment re-define and vary the status and the attributes applied by Greek law to the appellant bank. It is said that the decree should not be regarded as a law of succession but rather as a law of discharge because it was passed after the appellant bank came into existence and because its effect was to exonerate the appellant bank from further liability: to this is added the submission that bondholders cannot by a foreign decree be deprived of their rights under a contract governed by English law. But these submissions do not take due account of the nature of the bondholders' present claims. The claims are not claims in contract against the appellant bank. Until Greek law was altered, the position was, as Lord Keith pointed out in his speech in the *Metliss* case,[11] that the appellant bank represented and stood in the shoes of the contractual guarantor, the National Bank of Greece. They have not done so since the passing of Decree 3504.

But this does not mean that there was any purported interference with contracts governed by English law. As Viscount Simonds said in his speech in the *Metliss* case[12]: "Clearly the "obligations in English law (the proper law of the contract) "could not be affected by a Greek law which purported to vary "its terms." The contracts remain unaffected by any of the Greek legislation. There was, however, a period when the law of Greece directed the appellant bank to undertake certain

[11] [1958] A.C. 509, 530. [12] Ibid. 526.

liabilities: while that period lasted bondholders found a substitute for their contractual debtor: but it was just as competent for the Greek sovereign power to terminate the period as it was for such power to originate it. The effect of the new decree may be to deprive bondholders of a hope to which they had looked forward, but their hope had as its basis the further hope that Greek law would remain as it was. It was fully within the competence of the Greek sovereign power to pass Decree 3504. When the law was changed, there was, so far as bondholders were concerned, the withdrawal of what had resulted to their advantage: but that does not mean that Decree 3504 was either confiscatory or discriminatory in its scope or was of the nature of a penal or revenue law or that English public policy could demand that it be not recognised. All bondholders alike would be affected by the change in the law. Nor does it seem to us that the respondents can derive assistance from *Lynch* v. *Paraguay Provisional Government*.[13] If English law lays it down that the succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death, then any change in the law of the place of domicile after the death of the deceased becomes irrelevant and immaterial. Lord Penzance pointed out how inconvenient and unjust might be the consequences if English law adopted a different rule under which it was necessary to give effect to retrospective changes that the legislative authority of the foreign country might later make in that law.

It is said that at the time of the decree in February, 1953, though bondholders would appreciate that the assets of the National Bank of Greece were being taken over by the appellant bank, yet they (the bondholders) might refrain from taking any steps open to them in England under the Companies Act because of the knowledge that the appellant bank were being charged with the liabilities of the National Bank of Greece: it is said that as the appellant bank did take over the assets of the defunct bank and that as such assets would no longer be assailable at the instance of bondholders, any enactment which relieves the appellant bank of any obligation to bondholders should be regarded as being confiscatory in nature and one which on principles of rational justice should be disregarded. But in our judgment any bondholders who had looked ahead to an expectation of claiming, if necessary, against the appellant bank must have recognised that their recourse against the appellant bank would depend not upon any contractual rights but upon establishing that by Greek law the appellant bank was required to discharge certain obligations. That they cannot now do. The reflection that in the past and in reference to obligations accruing in the past they could have done so may give rise to disappointment but does not establish any present liability in the appellant bank.

[13] (1871) L.R. 2 P. & D. 268.

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In our judgment the bondholders fail to show that they can recover from the appellant bank and we allow the appeals.

Appeals allowed.
Leave to appeal to the House of Lords.

Solicitors: *Stibbard, Gibson & Co.; Herbert Smith & Co.*

J. A. G.

[QUEEN'S BENCH DIVISION.]

DUNN *v.* BIRDS EYE FOODS LTD.

1959
April 29, 30.

Lord Parker C.J., Donovan and Salmon JJ.

Factory—Criminal liability—Dangerous machinery (fencing)—Duty to guard against acts reasonably foreseeable—Unfenced nip between conveyor belt and drum—Employee cleaning machinery in motion—No danger to operator—Whether duty to fence—Whether injury "in consequence" of contravention of Act—Whether lacerated hand "injury to health"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14 (1), 133, 152 (1).

By section 14 (1) of the Factories Act, 1937: "Every dangerous "part of any machinery . . . shall be securely fenced."

By section 133: "If any person . . . suffers any bodily injury, in "consequence of the occupier . . . of a factory having contravened "any provision of this Act . . . the occupier . . . shall . . . be "liable to a fine not exceeding £100 . . . Provided that (*a*) in the "case of injury to health, the occupier . . . shall not be liable to a "fine under this section unless the injury was caused directly by "the contravention . . . "

A general labourer employed in a factory on the sanitation shift was engaged in cleaning an electrically-driven belt conveyor. Contrary to his instructions he set the machine in motion and endeavoured to clean it manually; while so doing his hand was caught and lacerated in a nip created between the moving belt and a revolving drum. The drum and belt could have been securely fenced by a fixed guard, but at the time of the accident were unfenced; had a guard been fitted it would have been possible to clean the machine. The construction of the machine was such that the operator was in no danger when operating it. The employee knew that it was wrong to turn the machine on, and the accident was his own fault. An information was preferred against his employers alleging that they had contravened section 14 (1) of the Factories Act, 1937, in that a certain part of dangerous machinery, the drum and belt, was not securely fenced and that in consequence of such contravention the employee had suffered bodily injury whereby they were liable to a fine as provided by section 133 of the Act. The justices accepted a submission for the employers that there was no case to answer and dismissed the information. On appeal by the prosecutor:—

Held, (1) that since there was an appreciable, although not a serious, risk that any member of the sanitation shift might have his hand caught if the machinery were set in motion while he was

cleaning the conveyor belt or drum, the unfenced nip was a reasonably foreseeable cause of injury, and a dangerous part of machinery which there was a duty to fence under section 14 (1) of the Act and that, accordingly, at the time of the accident the employers were in breach of the section.

Dictum of Lord Reid in *John Summers & Son Ltd.* v. *Frost* [1955] A.C. 740, 766; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870 applied.

(2) That the accident to the employee was "in consequence" of that contravention within section 133 of the Act notwithstanding that it was due to his own fault, for had the machinery been fenced at the moment of the accident, the accident would not have occurred.

(3) That, on its true construction, proviso (*a*) to section 133 of the Act of 1937 applied to cases of injury to health such as disease, which formed only one class of the injuries covered by the words "bodily injury," and not to the class of injury occasioned by breaches of section 14 (1); the employers, therefore, could not rely on the fact that the direct cause of the accident was the employee's own carelessness, but, on the evidence before the justices were liable under section 133.

CASE STATED by Lancashire justices sitting at Liverpool.

An information was preferred by John Thomas Dunn, an inspector of factories, against the defendants, Birds Eye Foods Ltd., the occupiers of a factory at Lees Road, Kirkby, alleging that they, on August 22, 1958, contravened section 14 (1) of the Factories Act, 1937, in that a certain dangerous part of the machinery, namely, the end drum with belt of the conveyor between the bean snippers and the washers, was not securely fenced, and that, in consequence of such contravention one James Malcolm Owens suffered bodily injury whereby the defendants were liable to a fine not exceeding £100 as provided by section 133 of the Act.[1]

The following were among the facts found by the justices: The premises in question were a factory within the meaning of the Factories Act, 1937, and the defendants were at all material times the occupiers thereof. On August 22, 1958, Owens was employed by the defendants as a general labourer on the sanitation shift, and at 11.20 p.m. on that day was engaged in cleaning a belt conveyor driven by an electric motor. The conveyor ran alongside a row of bean snipping machines and consisted of an endless belt 24 inches wide, stretched over two revolving drums.

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

S. 133: "If any person is killed, or dies, or suffers any bodily injury, in consequence of the occupier or owner of a factory having contravened any provision of this Act . . . the occupier or owner . . . shall . . . be liable to a fine not exceeding £100 . . . Provided that (*a*) in the case of injury to health, the occupier or owner shall not be liable to a fine under this section unless the injury was caused directly by the contravention . . ."

S. 152 (1): "In this Act . . . 'Bodily injury' includes injury to health . . ."

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At one end of the conveyor (the left-hand end) the drum was 8 inches in diameter and the centre line thereof was 23 inches above the floor. To the right of the drum was a vertical table leg, the gap between the leg and the periphery of the drum at its nearest point being 3½ inches and at its farthest point 7⅛ inches. When the drum was revolving under power a nip was created between the periphery of the drum and the belt at the point where the belt first came into contact with the drum. The drum and belt could have been securely fenced by a fixed guard but were unfenced at the time of the accident. In front of the conveyor was an open space where Owens stood while cleaning it. There was ample room for a person falling to get his hand in contact with the drum. However, the operator of the machine was in no danger when operating it. At the time of the accident there were only about seven employees of the defendants on the premises, all of them engaged in the sanitation shift.

Owens had been instructed by the defendants not to clean machinery while it was in motion, and to use a brush for the purpose of dislodging particles from the drum. Notwithstanding his instructions, he switched the machine on for the purpose of cleaning it and proceeded to clean it while in motion under power. He started by endeavouring to clean the conveyor belt with water from a hose; finding that the hose was too short to reach the drum, instead of fetching a further available length of hose, he endeavoured to clean the left-hand end of the conveyor by swilling it down with water from a bucket. Finding that that means was ineffective for removing waste particles of beans from the drum. Owens put his right hand between the drum and the table leg and endeavoured to sweep the particles manually from the revolving drum. His hand was caught in the nip between the drum and the belt and was lacerated sufficiently severely to prevent him from working for four weeks. Owens had turned the machine on and left it in motion to save him walking up and down to the switch, and he did this knowing that it was quite wrong. The accident to Owens was his own fault. Had it been fitted with a guard the machine could have been cleaned in the following manner: the machine would have been stopped, the guard removed and the exposed portions of the machine cleaned; the guard would then have been replaced, the machine inched round to expose a previously unexposed portion of the machine, when it would have been stopped and the newly exposed portion cleaned, the guard then being replaced and the inching process continued, the guard being removed when the machine was stationary and replaced when it was put in motion until the whole of the machine had been cleaned.

At the close of the case for the prosecutor it was submitted and contended for the defendants that there was no case to answer and/or that the information should be dismissed; that the part of the machinery in question was not a dangerous part of

the machine under section 14 (1) of the Factories Act, 1937, and that there had therefore been no contravention of the section; and that, if there had been a contravention of the section, the bodily injury suffered by Owens had not been caused directly by such contravention.

It was contended by the prosecutor that a prima facie case had been made out that the defendants had contravened the provisions of section 14 (1) of the Act; that Owens had suffered bodily injury in consequence of that contravention by the defendants within the meaning of section 133 of the Act; and that, on the true construction of section 14 (1) the drum and belt constituted a dangerous part of the machinery at the point where a nip was created between them.

The justices then visited the factory and found that the belt was very slow-moving, very flexible, and its tension low; that to insert a hand in the space between the table leg and the drum a person would have to be in a stooping or kneeling position; and that it would be very improbable that the hand of a person falling would enter the space between the table leg and the drum owing to the smallness of the space and the height of it from the floor.

They were of the opinion that there was no case for the defendants to answer, and that the information should be dismissed, and accordingly they dismissed the information.

The prosecutor appealed.

S. R. B. Cooke for the appellant prosecutor.
Andrew Rankin for the defendants.

The following cases were cited in argument: *John Summers & Son Ltd.* v. *Frost*[2]; *Wraith* v. *Flexile Metal Co. Ltd.*[3] and *Blenkinsop* v. *Ogden.*[4]

LORD PARKER C.J. I will ask Salmon J. to give the first judgment.

SALMON J. On September 25, 1958, the appellant, one of Her Majesty's Inspectors of Factories, preferred an information against the defendants before the justices for the County of Lancaster in the Petty Sessional Division of Liverpool County, under section 133 of the Factories Act, 1937.

At the conclusion of the appellant's case it was submitted on behalf of the defendants that there was no case to answer. The justices upheld that decision and dismissed the information, and this case now raises the question as to whether the justices came to a right decision in point of law.

The defendants are the occupiers of certain premises at Lees

[2] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.
[3] [1943] 1 K.B. 24; [1942] 2 All E.R. 549.
[4] [1898] 1 Q.B. 783; 14 T.L.R. 360.

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Road, Kirkby, in the county of Lancaster, which premises are a factory within the meaning of the Factories Act, 1937.

At 11.20 on August 22, 1958, James Malcolm Owens was employed in the factory on a sanitation shift. There were seven men on this shift and they were the only persons on the premises at the time. Owens was engaged in cleaning a belt conveyor driven by an electric motor. The conveyor ran alongside a row of bean snipping machines. It consisted of an endless belt 24 inches wide, stretched over two revolving drums, and about 27 inches above the floor of the factory. When the drums were revolving under power a nip was created between each drum and the belt at the point where the belt first came in contact with the drum. The drums and the belt could have been securely fenced by a fixed guard but were unfenced at the time of the accident. The operator of the machine was so placed that he was in no danger from any nip when he was operating the machine. Any member of the sanitation shift, however, might be in danger of having his hands caught in a nip if, for example, the belt were to be set in motion whilst it was being cleaned.

Owens had been instructed by the defendants not to clean machinery while it was in motion; but notwithstanding his instructions he switched the machine on for the purpose of cleaning it and proceeded to clean it whilst in motion under power. There were waste particles of beans from the drum, and instead of cleaning them off as he should have done with a hose or a brush, he tried to sweep them manually from the revolving drum. Not very surprisingly his hand became caught in one of the nips to which I have referred, and was hurt badly enough to prevent him from working for four weeks. Owens had turned the machine on and left it in motion to save him walking up and down to the switch, and he did this knowing it was quite wrong. The accident was his own fault. If fitted with a guard, the machine could have been cleaned in the following manner: The machine would have been stopped and the guard removed and the exposed portions of the machine cleaned. The guard would then have been replaced and the machine inched round to expose a previously unexposed portion of the machine. The machine would then have been stopped, the guard removed and the newly exposed portion of the machine cleaned and the guard then replaced and the inching process continued, the guard being removed when the machine was stationary and replaced when it was put in motion for the inching process until the whole of the machine had thereby been cleaned.

The prosecution was brought, as I have said, under section 133 of the Factories Act, 1937, which reads, so far as is material, as follows: "If any person is killed, or dies, or suffers any bodily "injury, in consequence of the occupier or owner of a factory "having contravened any provision of this Act or of any regula- "tion or order made thereunder, the occupier or owner of the "factory shall, without prejudice to any other penalty, be liable

"to a fine not exceeding one hundred pounds." I need not read the rest of the main part of the section. There is a proviso, to which I shall presently refer.

It was alleged against the defendants that Owens had suffered bodily injury in consequence of the defendants having contravened the provisions of section 14 (1) of the Act, which relates to fencing. That section, so far as is relevant to this case, provides: "Every dangerous part of any machinery . . . shall be securely "fenced unless it is in such a position or of such construction as "to be as safe to every person employed or working on the "premises as it would be if securely fenced." The first question, therefore, that arises, is as to whether or not the nip formed by the drum and the conveyor belt in which Owens caught his hand is a dangerous part of the machinery in the defendants' factory.

It is argued on their behalf that the nip was in such a position as to be as safe to every person employed or working on the premises as it would have been if securely fenced. To my mind, that argument is quite untenable. There is an appreciable risk, although perhaps not a very serious one, that any member of the night sanitation shift might have had his hand caught in the unfenced nip if the machinery were to be set in motion whilst he was cleaning the conveyor belt or drum. The unfenced nip may not have been a very probable cause but, in my judgment, it was a reasonably foreseeable cause of injury. Accordingly, at the time of the accident the defendants were in contravention of section 14 (1) of the Act: see *John Summers & Sons Ltd.* v. *Frost*,[1] *per* Lord Reid.[2]

The question then arises as to whether Owens' injury was in consequence of the defendants' contravention of the statute within the meaning of section 133. Mr. Rankin, who has urged every point that could be urged on the defendants' behalf, contends that as the accident was Owens' own fault in that, contrary to instructions and with full knowledge of the danger, he tried to clean the drum with his bare hands whilst it was in motion, his injury cannot be said to be in consequence of the machinery being unfenced. He says that the injury was solely in consequence of Owens' own fault. He argues that the contrary view is unreal because even if the defendants had fitted the nip with a guard it would not have made the slightest difference. Owens would have removed the guard to clean the drum and the accident would certainly have happened just as it did happen. I must confess that at first sight I was attracted by this argument, and I have every sympathy with the justices in accepting it. They certainly took the greatest trouble with this case and have stated it with admirable clarity. For my part, however, I have come to the conclusion that the argument that the injury to Owens was not in consequence of the defendants' breach of section

[1] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

[2] [1955] A.C. 740, 766.

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14 ought not to be accepted. It is to be observed that this section imposes an absolute duty. Every time a dangerous part of any machinery to which the section applies is in motion unfenced the section is contravened. The nip was a dangerous part of the machinery to which the section applies and was unfenced at the time of the accident. At that moment, therefore, the defendants were in breach of the section and, but for that breach—that is to say, if at that moment the nip had been fenced—the accident would not have occurred.

In these circumstances it seems impossible to hold that the injury was not in consequence of the defendants' contravention of section 14. It is, in my judgment, no answer to say that in a civil action Owens' contributory negligence was such that he might have been held 90 per cent. or even 93 per cent. to blame for his injury. Even if the defendants had fitted a guard and Owens had deliberately removed it contrary to instructions, it would have made no difference to their liability under section 133. They would still have been in breach of their absolute duty under section 14 (1) at the moment of the accident, notwithstanding that the breach was occasioned solely by the fault of Owens. This breach would therefore have been a cause of the injury inasmuch as the accident would not have occurred if at the critical moment the nip had been fenced. The policy of the legislature seems to be to impose an absolute obligation upon the occupiers of factory premises so to arrange their affairs that accidents of this kind shall not occur however careless their servants may be. The provisions of the statute are rigorous and in the circumstances of this case impose an onerous burden and, indeed, considerable hardship, upon the defendants. These considerations, however, cannot affect the true construction of the statute although they provide a strong basis for mitigation which the justices will no doubt take into account.

Mr. Rankin took another point on behalf of the defendants with which I ought briefly to deal. He contends that even if the injury to Owens was in consequence of the defendants' contravention of section 14 (1), the proviso to section 133 applies, and accordingly the defendants are not liable under that section unless the injury to Owens was directly caused by that contravention. The proviso to section 133 reads as follows: "Provided "that (*a*) in the case of injury to health, the occupier or owner "shall not be liable to a fine under this section unless the injury "was caused directly by the contravention . . ."

I am disposed to agree that if the proviso applies the defendants would not be liable since, although the contravention of section 14 (1) was a cause, it was not the direct cause of Owens' injury. The direct cause was his own carelessness. In my judgment, however, the proviso does not apply to this case. The injury which Owens suffered was not an injury to health within the meaning of the proviso. These words are apt to describe a

disease which a workman may suffer as a result, for example, of a contravention of section 47, which deals with the removal of dust and fumes, but are not apt to describe a mangled hand suffered as the result of a contravention of section 14 (1). Section 133 imposes a liability if any person is killed or dies or suffers bodily injury in consequence of the contravention of any provision of the Act. The definition section of the Act, section 152, provides that "'Bodily injury' includes injury to health," that is to say, disease, which the words "bodily injury" would not in my view otherwise cover. If the defendants' contention were right, one would expect the proviso to follow the words of the main part of the section and to read "in the case of bodily "injury there shall be no liability unless the injury was caused "directly by the contravention." The proviso, however, uses different language and, in my view, is confined to cases of injury to health which form only one class of the injuries covered by the words "bodily injury" and does not apply to the class of injury occasioned by breaches of section 14 (1). It is to be observed that this construction gives section 133 the same meaning as the corresponding sections of the Factory and Workshop Acts of 1878 and 1895. If in 1937 the legislature had intended to alter the law in this respect it would, in my view, have used the words "bodily injury" and not the words "injury to health" in the proviso to section 133.

For these reasons I would allow the appeal and remit the case to the justices with a direction that unless any further evidence is called on the part of the defendants the evidence now before them discloses an offence.

DONOVAN J. I agree, and in view of the very full judgment delivered by my brother, I have nothing to add.

LORD PARKER C.J. I also agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Labour and National Service; Simpson, North, Harley & Co.*

J. F. L.

[PROBATE, ETC., DIVISION.]

1959
April 6, 7, 16.

Karminski J.

BLENHEIM (OWNERS) *v.* IMPETUS (OWNERS). THE IMPETUS.

[1957 B. 394.]

Shipping—Towage—Contract—Construction—Negligent navigation of tug—Towage agreement—Construction—"Whilst towing"—"When "the tug is in a position to pick up ropes or lines"—United Kingdom Standard Towage Conditions.

Ships' Names—The Impetus.

The United Kingdom Standard Towage Conditions were incorporated in a contract under which the defendants, who were tug-owners, agreed to provide two tugs to tow the plaintiffs' vessel *Blenheim.* One of these tugs, the *Impetus,* approached the *Blenheim* and was making a turn to starboard so as to be able to pass a line to her, when she came into collision with the *Blenheim's* starboard side, causing damage thereto. Prior to the collision no orders had been given from the *Blenheim,* as she had been regularly towed by the *Impetus* and both ships' crews were well acquainted with the necessary towage procedure. At the time of the collision the *Impetus* was in a position to receive any orders given from the *Blenheim* to pick up ropes or lines, but was not yet in a position where those on board her could heave a line to the *Blenheim,* although those on board the *Impetus* were prepared to heave a line and those on board the *Blenheim* were ready to receive such line at the appropriate time.

The United Kingdom Standard Towage Conditions provided, inter alia: "(1) For the purpose of these conditions the phrase "'whilst towing' shall be deemed to cover the period commencing "when the tug is in a position to receive orders direct from the "hirer's vessel to pick up ropes or lines, or when the towrope has "been passed to or by the tug, whichever is the sooner . . . Towing "is any operation in connection with holding, pushing, pulling or "moving the ship. (2) On the employment of a tug the master "and crew thereof become the servants of and identified with the "hirer and are under the control of the hirer or his servants or "agents, and anyone on board the hirer's vessel who may be "employed and/or paid by the tugowner shall be considered the "servant of the hirer. (3) The tugowner shall not, whilst "towing, bear or be liable for damage of any description done by "or to the tug, or done by or to the hirer's vessel, or for loss of or "damage to anything on board the hirer's vessel . . . arising from "any cause, including negligence at any time of the tugowner's "servants or agents . . . and the hirer shall pay for all loss or "damage . . . and shall also indemnify the tugowner against all "consequences thereof."

The defendants admitted that the collision was caused by the negligent navigation of the *Impetus,* but claimed that clause 2 and/or clause 3 of the towage conditions protected them from liability:—

Held that, since at the time of the collision the *Impetus* was in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, if such orders had been necessary, the collision had occurred "whilst towing" within the meaning of clause 1 of the conditions, although the *Impetus* had not been in a position to

carry out such orders; accordingly, the defendants were protected by the terms of clause 3 from liability for the negligent navigation of their vessel.

Glen Line Ltd. v. *W. J. Guy & Sons. The Glenaffric* [1948] P. 159; sub nom. *Guy (W. J.) & Son* v. *Glen Line Ltd.* [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174 applied.

The Uranienborg [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165 distinguished.

ACTION.

On June 15, 1956, a collision occurred in the River Tyne between the plaintiffs' vessel *Blenheim* and the defendants' tug *Impetus*. The *Blenheim* was a regular visitor to the Tyne and had been towed by the *Impetus* on many occasions.

As the *Blenheim* was proceeding on a normal up-river course, the *Impetus*, which had been engaged to tow the *Blenheim* under a towage agreement which incorporated the United Kingdom Standard Towage Conditions, left her moorings and approached the *Blenheim* on her starboard side. The *Impetus* attempted to turn hard to starboard and to come on to a parallel course to the *Blenheim* for the purpose of passing a line, but failed to complete her turn and came into collision with the *Blenheim's* starboard side, causing damage thereto. No orders had been given from the *Blenheim*, as those on board both vessels knew from long usage how the towage connection was to be established, but at the time of the collision the *Impetus* was in a position to receive orders from the *Blenheim* to pick up ropes or lines, if such orders had been necessary. The mate and three members of the crew of the *Impetus* were on her after-deck ready to throw a heaving line to the *Blenheim*, while several of the crew of the *Blenheim* were standing by on her forecastle head ready to receive the line, but the *Impetus* had not yet reached a position where the line could be passed.

The relevant clauses of the United Kingdom Standard Towage Conditions provided:

"(1) For the purpose of these conditions the phrase 'whilst "'towing' shall be deemed to cover the period commencing when "the tug is in a position to receive orders direct from the hirer's "vessel to pick up ropes or lines, or when the towrope has been "passed to or by the tug, whichever is the sooner and ending "when the final orders from the hirer's vessel to cast off ropes or "lines have been carried out, or the towrope has been finally "slipped and the tug is safely clear of the vessel, whichever is "the later. Towing is any operation in connection with holding, "pushing, pulling or moving the ship.

"(2) On the employment of a tug the master and crew thereof "become the servants of and identified with the hirer and are "under the control of the hirer or his servants or agents, and "anyone on board the hirer's vessel who may be employed and/or "paid by the tugowner shall be considered the servant of the "hirer.

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"(3) The tugowner shall not, whilst towing, bear or be liable "for damage of any description done by or to the tug, or done "by or to the hirer's vessel, or for loss of or damage to anything "on board the hirer's vessel, or for the loss of the tug or the "hirer's vessel or for any personal injury, or loss of life, arising "from any cause, including negligence at any time of the tug-"owner's servants or agents, unseaworthiness, unfitness or break-"down of tug, its machinery, boilers, towing gear, equipment, or "hawsers, lack of fuel, stores or speed, or otherwise, and the "hirer shall pay for all loss or damage and personal injury or loss "of life, and shall also indemnify the tugowner against all "consequences thereof."

By their statement of claim the plaintiffs alleged that the collision was solely caused by the negligent navigation of the *Impetus*. By their defence the defendants denied negligence and alleged that the collision was caused by the negligence of those on board the *Blenheim*. Alternatively, the defendants contended that the collision had occurred "whilst towing," and/or during "the employment of a tug" within the meaning of the United Kingdom Standard Towage Conditions, upon the terms of which the *Impetus* had been engaged, and that the defendants were protected from liability by clause 2 and/or clause 3 thereof. The plaintiffs by their reply admitted that the *Impetus* had been engaged under the terms of the United Kingdom Standard Towage Conditions, but denied that at the time of the collision those conditions had attached. By an amendment to their defence the defendants admitted that the collision was solely caused by the negligent navigation of the *Impetus*, and relied only by way of defence to the plaintiffs' claim upon the terms of the towage conditions.

J. V. Naisby Q.C. and *R. F. Stone* for the plaintiffs.
Waldo Porges Q.C. and *H. V. Brandon* for the defendants.

The following cases were cited in argument, in addition to those referred to in the judgment: *The Baltyk* [1]; *Partafelagid Farmur* v. *Grangemouth and Forth Towing Co.* [2]

April 16. Karminski J. delivered the following judgment, in which he stated the facts, referred to the admission of negligent navigation by the defendants, found that the angle of collision was approximately 75 degrees, and continued: The defendants, however, raised another matter of substance. Relying on the terms of the United Kingdom Standard Towage Conditions it is alleged that at the time of the collision the *Impetus* was ready to throw a heaving line to the *Blenheim* and the *Blenheim* was ready to receive the line aboard and to bend it on to one of the *Blenheim's* wires to be used as a towing hawser. It is contended that the

[1] [1948] P. 1; [1947] 2 All E.R. 560; 80 Ll.L.Rep. 668.

[2] [1953] 2 Lloyd's Rep. 699.

collision occurred within the meaning of the conditions whilst the *Impetus* was towing the *Blenheim* or during the employment of the *Impetus* as a tug and that, therefore, notwithstanding the negligence of the *Impetus* the defendants are protected by clause 2 or 3 of the towage conditions.

[His Lordship read clauses 1, 2 and 3 of the conditions and continued:] By their reply the plaintiffs admitted that the *Impetus* was engaged to tow the *Blenheim* under the terms of the towage conditions, but specifically denied that at the time of the collision such conditions had attached. Indeed it was conceded by Mr. Naisby in opening his case that the sole point for decision was whether or not at the time of the collision the towage conditions had attached. It is not suggested by the defendants that the towrope had been passed to or by the tug at the time of the collision.

For the defendants, Mr. Porges submitted that the words of clause 1 construing the term "whilst towing" refer to receiving orders to pick up ropes or lines, and not to receiving the ropes or lines themselves. It is common ground in this case that no orders were in fact given by those on board the *Blenheim* to the *Impetus*, since the crews of both ships knew from long usage precisely what to do. At the moment of collision those on board the *Impetus* were prepared to heave a line, and those on board the *Blenheim* were ready to receive the heaving line from the *Impetus* and to secure it to their own wire.

With this proposition Mr. Naisby was in partial agreement, but argued that the true test was whether or not the *Impetus* was at the time of the collision ready to receive and to carry out the order to heave her line if such order had been given. In Mr. Naisby's submission the *Impetus* was at the time of the collision in no position either to heave her own line or to receive the *Blenheim's* wire, since she was approaching the *Blenheim* at an angle of nearly 90 degrees. In cross-examination the mate of the *Impetus* agreed that both before and at the time of collision he was not in a position to heave a line to the *Blenheim*. In fact, he heaved his line quite shortly after the collision.

I have no difficulty in accepting Mr. Naisby's contention that the burden in this case is on the defendants to establish that they have brought themselves within the protection of clauses 1 to 3 of the towage conditions. Clause 1 has, as it seems to me, extended the ordinary meaning of the words "whilst towing" to cover a state of affairs in which towing is contemplated but not being carried out.

It is clear on the evidence that at the time of the collision the *Impetus* was in a position to receive the order to heave the line, but was not in a position until after the collision to carry out such an order. The fact that the *Blenheim* on this, as on very many earlier occasions, gave no order is in a sense irrelevant. The question is whether at the collision the *Impetus* was in a

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position to receive orders from the *Blenheim* to pick up ropes or lines had such orders been given.

The United Kingdom Standard Towage Conditions in their present form have been in use, as I was told by counsel, for over 30 years. During that period they have been judicially considered on several occasions, but I find it necessary to consider only two decisions. In *The Uranienborg* [1] the tug was engaged to help a ship from a wharf. The tug arrived early and before the ship had finished discharging and while she was still waiting for a pilot and boatmen. The tug collided with the ship at a moment when the ship was not ready to give orders to pick up ropes or lines, and when the tug was neither thinking about nor expecting such an order. It was argued on behalf of the tug that she came within the definition of "whilst towing" because there was a contract of towage, and because she was within hailing distance of the ship at the time of collision.

This argument was rejected by Merriman P. as being too wide. Discussing the meaning of the word "position" the President said [2]: "I doubt whether the word 'position' is only "used in the sense of local situation. I think it involves also the "conception of the tug being herself in a condition to receive and "act upon the orders. But however that may be, the orders "which she is to be in a position to receive are orders to pick up "ropes or lines—not orders generally, but these specific orders, "and I think that that must have some reference to the intention "of those on board the ship to give those orders, and to the readi-"ness of those on board the tug to receive them." Pointing out that in that case at the time of collision those on board the tug were not thinking about, and had not begun to expect, an order to pick up ropes or lines, the President concluded his judgment in these terms [3]: "In my opinion the least that is involved in arriv-"ing at the moment when the period commences is that the tug "herself at any rate should be able to show that she was in a "position to receive, and having received, to comply with these "orders in connection with ropes or lines. At the material time I "am satisfied that that period had not arrived; but I think also "that this phrase has to be read as if there were two parties "involved in the matter, and that until the moment has come at "which orders may reasonably be expected to be given from the "ship, the tug cannot be said to be in a position to receive orders "from the ship. Whichever way it is looked at, even if looked "at from the point of view of the tug alone, I am satisfied that "on the facts of this case she was not in a position to receive "orders and that the towing had not begun."

From this Mr. Naisby argued that the President was laying down a general principle that to bring herself within the conditions the tug must prove three things: (1) That the ship was ready to

[1] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.

[2] [1936] P. 21, 27.

[3] [1936] P. 21, 29.

give the order to pick up ropes or lines. (2) That the tug must be ready to receive such orders, and (3) be able and ready to act upon them.

I do not think that the President intended to lay down any general proposition of this kind, but was limiting his observations to the facts of that particular case, and I am fortified in that view by the observations of the Court of Appeal in *The Glenaffric*.[4] In that case also the meaning of the words "whilst towing" had to be construed, though in the light of facts quite different from those in *The Uranienborg*.[5] In *The Glenaffric*[6] the tug approached the ship three times, being ready to receive lines and to tow the ship. On each occasion the tug was told to keep clear or to wait. Finally, the ship dismissed the tug with a message to the dockmaster, saying that the ship would not dock on that tide. Dropping astern on that order, the tug ran aground and sustained damage. The Court of Appeal refused to read into what Scott L.J. described as the plain meaning of the words of clause 1 any words modifying them. Scott L.J. used the following words[7]: "It is quite clear, on the evidence, as the learned judge "held, that the tug was in that position. The mate was standing "by ready to heave the line and so pick up a rope from the ship, "and I reject Mr. Hodgson's argument because in order to make "it good he has to read into the clause, after the words 'when "'the tug is in a position to receive orders,' the further words "'and the ship is ready to give orders,' which are not there. "Had that been the intention of the parties to the contract or "even those who framed the Standard United Kingdom Condi-"tions, obviously some such words would have been inserted in "the clause. They were omitted, and I think it is clear why they "were omitted. After the tug has arrived at the ship at a proper "time, namely, the normal time in accordance with ordinary "practice, in order to take the ship in tow, she is from then in "attendance on the ship, and necessarily then begins to incur the "risk of damage to herself by contact with the ship. After that, "obviously, as it seems to me, there can be no justification for "implying the suggested words. Such an additional condition, "protecting the shipowner, could easily have been expressed, and "I can see no ground for implication according to the ordinary "rule of construction that nothing can be implied, unless it is "necessary to give efficacy to the business bargain that the two "parties must have intended when they made the contract. Mr. "Hodgson did not actually submit that those words ought to be "implied, but unless they are this argument must fail."

Bucknill L.J. agreed with the judgment of Scott L.J., adding these observations[8]: "The other point I should like to say a word "about is this. I fully appreciate, speaking for myself, the point "Mr. Hodgson made that this must be to some extent treated

[4] [1948] P. 159; [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174.
[5] [1936] P. 21.
[6] [1948] P. 159.
[7] Ibid. 165.
[8] Ibid. 166, 167.

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"as a bilateral arrangement, and if the master or the pilot made "it clear to the tug before she got into the position to receive "orders that he was not ready to give orders, then the tug could "not, by putting herself in a position to receive orders, bring "herself within clause 1. But that does not cover the case "where, as Somervell L.J. suggested in argument, a ship leads "the tug to believe that she is ready to give or take a towrope. "I think in this case the facts led the tugmaster to believe that the "ship would be ready to give a rope, and, therefore, that argu-"ment does not apply to the facts of this particular case." Somervell L.J. also agreed, and pointed out that the tug reasonably expected to receive orders in relation to towage from the ship, and that clause 1 therefore applied.

In spite of Mr. Naisby's interesting argument to the contrary, I have come to the conclusion that clause 1 means what it says, and that the clause attached when the tug is in a position to receive orders to pick up ropes or lines. This presupposes that the ship is ready to give such orders, if they are required. But I cannot accept Mr. Naisby's submission that a tug can thereafter put herself outside the conditions by getting into a position which may for a short period make it impossible for her to carry out such orders. To import such a condition when the tug is already in attendance on the ship and therefore in danger of incurring damage would, as Scott L.J. pointed out in *The Glenaffric*,[9] be without justification. I find that here the collision occurred whilst towing, and there must be judgment for the defendants accordingly.

Judgment for the defendants.

Solicitors: *Sinclair, Roche & Temperley for Botterell, Roche & Temperley, Newcastle-upon-Tyne; Bentleys, Stokes & Lowless for Bramwell Clayton & Clayton, Newcastle-upon-Tyne.*

A. S-R.

[9] [1948] P. 159, 165.

[HOUSE OF LORDS.]

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March 16, 17, 18, 19; *May* 14.

BALDWIN & FRANCIS LTD. . . . Appellants;

AND

PATENTS APPEAL TRIBUNAL and Others Respondents.

Crown Practice—Certiorari—Inferior tribunal—Patents Appeal Tribunal—Whether certiorari will lie to tribunal—Patents Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 87), *ss.* 9, 85 (1).

Patents—Appeal Tribunal—Jurisdiction—Whether amenable to certiorari.

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* *Present*: Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning.

Crown Practice—Certiorari—Error of law on face of record—Construction of technical terms—Evidence necessary to enable court to construe documents—Whether assessors may be appointed to assist court—Whether certiorari applicable—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 98.
Evidence—Construction of documents—Extrinsic evidence—Meaning of words—Technical terms.

The effect of sections 9 (3), 14 (4), 85 and 87 of the Patents Act, 1949, was that no appeal lay to the Court of Appeal from the decision of the Patents Appeal Tribunal in the present proceedings, that it was an inferior tribunal and that the only remedy of persons aggrieved by a decision of it was by way of an order of certiorari.

A company made an application for a patent, whereupon, on the publication of its specification, the owners of a prior patent opposed the application on the ground (inter alia) that its specification could not fairly describe the invention or method by which it was to be performed without referring to their prior patent, and that such a reference should be directed under section 9 of the Act. Both the patent applied for and the prior patent concerned improvements designed to prevent the reclosing of an electric circuit in which an earth fault had developed, until that fault was repaired.

Subsequently, on investigation by the superintending examiner on behalf of the comptroller, it was decided that the later invention could not be performed without substantial risk of infringement of the prior patent, and, accordingly, there being no proposals for amending its specification, the superintending examiner, by a final decision, ordered that the patent applied for should be sealed with a reference to the prior patent.

On appeal, the Patents Appeal Tribunal reversed this decision. The owners of the prior patent applied for an order of certiorari on the ground that there was an error of law appearing on the face of the record in that the tribunal had misconstrued the rival specifications or one of them:—

Held, that certiorari should not issue.

Per Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow: Assuming (but not deciding) that the record on which the court was entitled to reach its conclusion included (as the appellants contended) the decision of the superintending examiner and the two specifications, as well as the decision of the tribunal, no error of law appeared on the face of the application.

Per Lord Denning: The documents formed part of the record and disclosed an error of law, so that this was a case in which certiorari might issue. Nevertheless, it should not issue because (1) the proper remedy for the appellants was to sue for infringement after the article had been made and (2), further, they could have pointed out the error to the tribunal so that it might have been corrected.

Per Lord Morton of Henryton, Lord Tucker and Lord Denning: Unless in a case where there is a dispute as to the meaning of relevant technical terms, when evidence must be called, the court may determine the meaning of such terms by consulting dictionaries or by the appointment of assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925.

Reg. v. *Medical Appeal Tribunal, Ex parte Gilmore* [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796 considered.

Decision of the Court of Appeal sub nom. *Reg.* v. *Patents Appeal Tribunal, Ex parte Baldwin & Francis Ltd.* [1959] 1 Q.B. 105; [1958] 2 W.L.R. 1010; [1958] 2 All E.R. 368 affirmed.

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BALDWIN & FRANCIS v. PATENTS APPEAL TRIBUNAL.

APPEAL from the Court of Appeal (Jenkins, Parker and Pearce L.JJ.).

This was an appeal, by leave of the House of Lords, against a judgment of the Court of Appeal dated May 2, 1958, dismissing the appeal of the appellants, Baldwin & Francis Ltd., against a judgment of the Divisional Court of the Queen's Bench Division (Lord Goddard C.J. and Donovan J.) dated October 14, 1957, dismissing a motion for an order of certiorari to quash the order of the Patents Appeal Tribunal (Lloyd-Jacob J.), the first respondent, dated January 17, 1957, which reversed interim and final decisions of the superintending examiner (Mr. E. T. Vincent for the Comptroller-General of Patents, the second respondent) whereby in opposition proceedings under section 14 of the Patents Act, 1949, he ordered, pursuant to section 9 of the Act, the insertion in the specification of letters patent No. 703,630 of Anderson Boyes & Co. Ltd., the fourth respondents, of a reference to the specification of letters patent No. 658,823 of the appellants (the petitioners in the opposition proceedings). In the specification of letters patent No. 703,630 the invention was declared by the fourth respondents and by Alexander Anderson, the third respondent.

The facts are set out in the opinion of Lord Morton of Henryton.

Patrick Graham Q.C., *Anthony Cripps Q.C.* and *Mervyn Heald* for the appellant company.

Geoffrey Tookey Q.C., *S. I. Levy Q.C.* and *John Hall* for the respondent company.

The only cases cited in argument were: *Reg.* v. *Patents Appeal Tribunal, Ex parte Champion Paper & Fibre Co.*[1]; *R.* v. *Northumberland Compensation Appeal Tribunal*[2]; *R.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[3]; *R.* v. *Warnford*[4]; *Williams* v. *Morland*[5]; *In re Kiashek*[6]; *Davies* v. *Price*[7]; *Reg.* v. *Bolton*[8]; *R.* v. *Nat Bell Liquors Ltd.*[9]; *Shore* v. *Wilson*[10]; *British Thomson-Houston Co. Ltd.* v. *Corona Lamp Works Ltd.*[11]; *R.* v. *Cheshire Justices, Ex parte Heaver*[12]; *R.* v. *Minister of Health*[13]; *Board of Education* v. *Rice*[14]; *Reg.* v. *Liverpool Justices*[15]; *In re Penny and South Eastern Railway Co.*[16] and *Walsall Overseers* v. *London & North Western Railway Co.*[17]

[1] [1957] 1 W.L.R. 248; [1956] R.P.C. 323; [1957] 1 All E.R. 227.
[2] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.
[3] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.
[4] (1825) 5 D. & R. 489.
[5] (1824) 4 D. & R. 583.
[6] (1854) 71 R.P.C. 453.
[7] [1958] 1 W.L.R. 434; [1958] 1 All E.R. 671.
[8] (1841) 1 Q.B. 66.
[9] [1922] 2 A.C. 128; 38 T.L.R. 541.
[10] (1842) 9 Cl. & F. 355.
[11] (1922) 39 R.P.C. 49, 67.
[12] (1912) 108 L.T. 374; 29 T.L.R. 23.
[13] [1939] 1 K.B. 232; 55 T.L.R. 4; [1938] 4 All E.R. 32.
[14] [1911] A.C. 179; 27 T.L.R. 378.
[15] [1959] 1 W.L.R. 149; [1959] 1 All E.R. 337.
[16] (1857) 7 E. & B. 660.
[17] (1878) 4 App.Cas. 30.

Their Lordships took time for consideration.

May 14. LORD MORTON OF HENRYTON (read by LORD SOMERVELL OF HARROW). My Lords, the question for decision in this House is whether there is or is not any error of law on the face of the record of the Patents Appeal Tribunal (Lloyd-Jacob J.) in the present case. That tribunal reversed interim and final decisions of the superintending examiner (Mr. E. T. Vincent acting for the Comptroller-General of Patents) whereby, in opposition proceedings under section 14 of the Patents Act, 1949, he ordered that there should be inserted in the third and fourth respondents' letters patent No. 703,630 a specific reference to the appellants' letters patent No. 658,823.

The first and second respondents were not represented at the hearing of this appeal and I shall hereafter refer to the third and fourth respondents as "the respondents."

This appeal has taken an unusual course, and in order to state the matters to be considered by this House it is necessary to set out the history of the case in some detail. I shall first state the relevant provisions of the Patents Act, 1949. They are as follows:

By section 14: "(1) At any time within three months from "the date of the publication of a complete specification under this "Act, any person interested may give notice to the comptroller "of opposition to the grant of the patent on any of the following "grounds:— . . . (*g*) that the complete specification does not "sufficiently and fairly describe the invention or the method by "which it is to be performed; . . . (2) Where any such notice "is given, the comptroller shall give notice of the opposition to "the applicant, and shall give to the applicant and the opponent "an opportunity to be heard before he decides on the case. . . . "(4) An appeal shall lie from any decision of the comptroller "under this section."

By section 9: "(1) If, in consequence of the investigations "required by the foregoing provisions of this Act or of proceedings "under section 14 or section 33 of this Act, it appears to the "comptroller that an invention in respect of which application "for a patent has been made cannot be performed without sub-"stantial risk of infringement of a claim of any other patent, "he may direct that a reference to that other patent shall be "inserted in the applicant's complete specification by way of "notice to the public unless within such time as may be pre-"scribed either—(*a*) the applicant shows to the satisfaction of "the comptroller that there are reasonable grounds for contesting "the validity of the said claim of the other patent; or (*b*) the "complete specification is amended to the satisfaction of the "comptroller. . . . (3) An appeal shall lie from any decision or "direction of the comptroller under this section."

By section 85: "(1) Subject to the provisions of this Act

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"with respect to Scottish appeals, any appeal from the comptroller under this Act shall lie to the Appeal Tribunal. . . . "(7) Upon any appeal under this Act the Appeal Tribunal may "exercise any power which could have been exercised by the "comptroller in the proceeding from which the appeal is "brought. . . . (9) Rules made under this section shall provide "for the appointment of scientific advisers to assist the Appeal "Tribunal upon appeals under this Act and for regulating the "functions of such advisers; and the remuneration of a scientific "adviser appointed in accordance with such rules shall be "defrayed out of moneys provided by Parliament. (10) An appeal "to the Appeal Tribunal under this Act shall not be deemed to "be a proceeding in the High Court."

By section 87 (1): "An appeal shall lie to the Court of "Appeal—(*a*) from any decision of the Appeal Tribunal on an "appeal under section 33 or section 42 of this Act where the "effect of the decision is the revocation of a patent; (*b*) from any "decision of the Appeal Tribunal under section 55 of this Act; "(*c*) with the leave of the Tribunal, from any decision of the "Tribunal under section 14 of this Act, where the effect of "the decision is the refusal of the grant of a patent on the "ground specified in paragraph (*d*) or paragraph (*e*) of sub-"section (1) of that section."

The effect of the provisions of sections 9 (3), 14 (4), 85 and 87 is that no appeal lies to the Court of Appeal from the decision of the Patents Appeal Tribunal in the present proceedings, that the Appeal Tribunal is an inferior tribunal, and that the only remedy of persons aggrieved by a decision of that tribunal is by way of order of certiorari.

The appellants were and are owners of a patent No. 658,823, the complete specification of which is entitled "improvements in "and relating to earth leakage protection systems for electric "motors, cables and other apparatus." Those improvements were designed to prevent the reclosing of a circuit in which an earth fault had developed, until that fault had been repaired.

On November 22, 1950, the respondents made application for patent No. 703,630, the complete specification of which was filed on December 24, 1951, and published on February 10, 1954. The specification was entitled "improvements in or relating to pro-"tective systems for polyphase alternating current loads." The purpose of the invention in question was similarly to prevent the reclosing of an electrical circuit while an earth fault which had developed remained unrepaired.

Within the statutory period the appellants gave notice of opposition under section 14 (1) of the Patents Act, 1949, on a number of grounds, of which the only material one was, and is, that the complete specification did not sufficiently and fairly describe the invention or the method by which it was to be performed, under the terms of subsection (1) (*g*) of section 14. The

appellants' contention was that the specification could not fairly describe the invention or the method by which it was to be performed without a reference being made to their patent No. 658,823, and that such a reference should be directed under section 9 of the Patents Act, 1949.

The reason for such a reference being directed by the Comptroller-General is that any member of the public proposing to make the apparatus described in the specification ought to be warned that in so doing he runs a substantial risk of infringing the prior patent mentioned in the reference.

By an interim decision dated June 15, 1956, the superintending examiner, on behalf of the comptroller, decided that the respondents' invention could not be performed without substantial risk of infringement of the appellants' patent. He rejected all other grounds of opposition, and allowed the respondents one month to submit proposals for amending their specification. No such proposals were forthcoming, and, accordingly, by a final decision dated August 31, 1956, he ordered that the patent applied for be sealed with a reference to the appellants' patent.

The respondents appealed from this decision to the Patents Appeal Tribunal and that tribunal reversed the order of the superintending examiner.

The appellants thereupon applied by motion to the Divisional Court of the Queen's Bench Division for an order of certiorari to bring up and quash the order of the Patents Appeal Tribunal on the ground that errors of law appeared on the face of the record. The alleged errors of law are set out in the statement by the appellants dated June 26, 1957, and include misconstruction by the tribunal of the revelant specifications.

The Divisional Court dismissed the motion. Lord Goddard C.J., after referring to sections 9 and 85 of the Patents Act, 1949, and to the rules made thereunder, said that it was obvious that Parliament and the Statutory Committees who had to make rules considered that matters relating to patents would be considered by experts; it was not intended that the Divisional Court should investigate difficult scientific questions. Lord Goddard pointed out that what the Patents Appeal Tribunal had to consider was whether there was a substantial risk that the respondents' patent infringed some other patent. The tribunal had come to the conclusion that on the evidence it could not find that there was such risk, and accordingly had allowed the appeal. Whether a patent could or could not be performed without substantial risk of infringement of some other claim was essentially a question of fact. Donovan J. delivered a concurring judgment.

The appellants appealed to the Court of Appeal, and that court (Jenkins, Parker and Pearce L.JJ.) dismissed the appeal. Parker L.J., in a judgment with which the other Lords Justices

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concurred, stated the contention of counsel for the appellants as follows [1]:

"Mr. Graham, on behalf of the appellants, puts his contention "in this way. Before the tribunal can decide whether there is "a substantial risk of infringement, it must construe the rival "specifications. The construction of a written document is a "matter of law. Reading the decision of the tribunal (so he says) "it is clear that the tribunal must have misconstrued the speci-"fications, and accordingly there is an error of law on the face "of the record.

"It is clear that proceedings such as these are in no sense "by way of appeal. The court can look, and look only, at the "reasoned decision, and at such other documents as can fairly "be said to form part of the record. If no reasoned decision "is given, the error of law, if error there be, will not be detected. "The face of the record (as Lord Sumner put it in *Rex* v. *Nat.* "*Bell Liquors Ltd.*[2]) was then 'the inscrutable face of a sphinx.' "In the ordinary case, where, as here, what is called a 'speaking "'order' is made, the error, if error there be, takes the form "of the misconstruction or misapplication of a statute or regula-"tion. This case, so far as I know, is the first case where it is "said that the error consists of the misconstruction of some other "document. Logically, however, if that document does form "part of the record and the decision on its face shows that the "tribunal has misconstrued it, I do not see why certiorari will not "lie. It is an error of law, albeit one different from that "sometimes found."

My Lords, Mr. Graham's argument in this House was to the same effect, and I entirely agree with the passage which I have just quoted. The learned Lord Justice then went on to hold that the two specifications formed part of the record but found it unnecessary to determine whether or not the decision of the superintending examiner also formed part of the record. He then pointed out that in order to determine whether either of the specifications had been misconstrued it was necessary for the court to decide what the right construction was. The documents dealt with technical matters of science, and technical terms were used. Where technical words were used in a document they were prima facie used in a technical sense and evidence could, and indeed must, be given to enable the court to understand the meaning of the language used. The Lord Justice was satisfied that the court could not construe the specifications without being informed by evidence and, that being so, the application failed in limine because the court in such proceedings was not entitled to look at the evidence given in the proceedings or to receive new evidence on affidavit.

[1] [1959] 1 Q.B. 105, 110; [1958] 2 W.L.R. 1010; [1958] 2 All E.R. 368.

[2] [1922] 2 A.C. 128, 159; 38 T.L.R. 541.

My Lords, I fully appreciate the difficulty felt by the Divisional Court and the Court of Appeal, and I agree that in cases where an order of certiorari is sought on the ground of error of law on the face of the record, the court is not entitled either to look at the evidence given in the proceedings or to receive new evidence. There are, however, other means whereby the meaning of technical words may be ascertained. For instance, counsel are sometimes ready to agree that well-known technical words have a particular meaning. In the present case the House was greatly assisted by an analysis of claim 1 of the appellants' specification No. 658,823, which was prepared by the appellants for the use of the Court of Appeal and accepted as correct by counsel for the respondents. Moreover, the court has power to appoint assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925.

It would, indeed, be regrettable in present times, when certiorari lies to so many tribunals dealing with scientific matters, if the courts were precluded from considering whether there was an error of law on the face of the record because they did not know the meaning of certain technical terms.

Your Lordships heard considerable argument as to what documents did or did not form part of the record in the present case. Mr. Graham submitted that the record included at least the decision of the superintending examiner, the notice of appeal to the Appeal Tribunal, the decision of the Appeal Tribunal and the two relevant specifications, and your Lordships have looked at all these documents de bene esse. I am content to assume that they all form part of the record, for, even on this assumption, I do not find any error of law on the face of the record.

The vital passage in the decision of the superintending examiner is as follows. Speaking of the respondents' specification No. 703,630 (they were the applicants before him) he said:

"I am satisfied that there is resistance, be it resistance U or "the resistance of winding 2, through which current is injected "by secondary winding 12, and this resistance is connected, by "switch 14, on the dead side of the circuit-breaker 6. The "current arises at the secondary winding 12, and the fault circuit "comprises the lines 7, 8, 9 and the fault to earth. Accordingly, "the injection of the current is achieved by all the components "disposed between the winding 12 and the lines 7, 8, 9, namely, "the resistance U, the winding 2 and the switch 14. I find no "difficulty in reading this arrangement on to the phrase in claim 1 "of specification 658,823, 'by means of a resistance' whether "it be resistance U or the resistance of winding 2. As a result, "I find that the invention described in applicants' specification "703,630 cannot be performed without substantial risk of infringe-"ment of claim 1 of opponents' specification 658,823."

Now, the analysis of claim 1 of this specification, to which I have already referred, states that "The claim includes four

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"alternatives and is equivalent to four separate claims rolled into "one." It then sets out the four alternative claims, identifying them by the letters A, B, C and D, and it is said by counsel for the appellants that the reasoning of the superintending examiner applies directly to alternative claim D. I think that this is so.

I now turn to the decision of the Patents Appeal Tribunal. It is short and I find it necessary to set it out in full. When the tribunal refers to "the applicants" or to "the appellants" he is, of course, referring to the present respondents.

"By this appeal the applicants for letters patent No. 703,630 "seek a reversal of two decisions given by Mr. E. T. Vincent "(superintending examiner, acting for the Comptroller-General) "dated June 15, 1956, and August 31, 1956, and ask that their "patent may be sealed without either amendment or the in-"sertion of a specific reference to letters patent No. 658,823.

"The hearing officer came to the conclusion that the per-"formance of the applicants' invention would involve substantial "risk of infringement of the cited letters patent, the material "claim of which reads as follows: 'An earth leakage protective "'control system for electric motors, cables or other apparatus "'operating on polyphase A.C. in which the reclosing of a "'circuit breaker or contactor under earth fault conditions is "'prevented by a lock out relay energised by rectified A.C. "'which is, or is derived from current injected through the "'fault circuit by means of a neutral point inductance or resist-"'ance, or a resistance connected on the dead side of the circuit "'breaker or contactor.'

"The general similarity of the applicants' construction to "apparatus covered by this claim is not and cannot be disputed. "It is an earth leakage protective control system for loads opera-"ting on three-phase A.C. and is designed to prevent by relay "action the reclosing of a circuit breaker which has been opened "on an earth fault occurring. The relay for such reclosing is "electrically energised through a resistance by current derived "from the mains supply. The characteristic of the opponents' "claim which it is contended does not appear in the appellants' "construction is that which specifies that the operation of the "relay is to be by rectified A.C. passing through a resistance. It "is conceded that the relay is operated by current, and that a "resistance is in circuit but it is urged that the current which "passes through the relay is not rectified A.C. This, on the "face of it, would appear to be a simple matter of technical "significance susceptible of ready proof by evidence. The "decision proceeds upon the basis that the presence of rectifier "4 in the circuit which energises the relay necessarily provides "rectified current, as indeed it must, but holds that the current "'injected through the fault circuit' is provided by the second-"ary winding 12 and passes through a resistance, another "winding 2, a switch 14, a power line through the fault to

"earth and so back to 12, thus specifying a circuit for the "current which does not include any rectifier. The appellants' "argument, as I understand it, proceeds upon the basis that if, "contrary to their view, any part of their apparatus can be said "to inject current through the fault circuit, that can only be "possible through the circuit specified by the hearing officer as "just set out, and in consequence, no rectification of the alter-"nating current is required or provided. Neither the evidence "filed nor the decision contain matters which would justify me "in holding that this contention may not be well founded and "as the substantiality of any risk of infringement depends upon "a finding that the contention is ill-founded, I find myself "unable to support the decision.

"The direction that a reference in the form prescribed by "rule 35 must be inserted in the application before sealing is "therefore reversed."

My Lords, I must now analyse this decision to see whether it contains, on its face, an error of law, and I do so assuming that for this purpose I am entitled to look at all the documents which are said by Mr. Graham to be part of the record. The tribunal first sets out the whole of claim 1 of specification No. 658,823. He then, down to the words "mains supply," makes certain observations on specification No. 703,630. These are not criticised by counsel for the appellants.

The next passage, down to "is not rectified A.C.," is strongly criticised by counsel for the appellants. They say that it entirely misstates the argument presented to the tribunal. That may be so, and it is a fact that a vacation intervened between the argument and the decision, but a misstatement of counsel's argument is not an error of law. Still less is it an error of law which appears on the face of the record. The next sentence is not and could not be relied upon as containing an error of law, and the same observation applies to the next sentence, which briefly describes the basis of the decision of the superintending examiner. Then follow two sentences containing one statement which does, I think, result from a consideration of the construction of the relevant specifications. That statement is that the substantiality of any risk of infringement depends upon a finding that an argument addressed to the tribunal by the then appellants (the present respondents) was ill-founded.

Mr. Graham contends that this statement shows that the tribunal, when he wrote his decision, must have forgotten the tenor of the argument and must have omitted to notice that claim 1 of the appellants' specification includes alternative D. He says that the decision of the superintending examiner was based entirely on the risk of infringement of alternative D; consequently the argument before the tribunal was directed entirely to the question whether performance of the respondents' invention would or would not infringe alternative D; the argument has

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twice been misstated by the tribunal, who makes no reference to alternative D; and the concluding statement by the tribunal reveals an error of law, for the substantiality of the risk of infringement does not depend upon the matters mentioned by the tribunal. The tribunal must have misconstrued specification No. 658,823 by omitting to notice that alternative D was included in claim 1.

My Lords, I cannot draw this conclusion from anything that appears on the face of the record. It is true that the decision of the tribunal contains no reference to alternative D, and that I should have expected the argument before the tribunal to concentrate on the risk of infringing alternative D; but it does not appear *on the face of the record* that the tribunal ever heard any argument on this point, and the omission of any reference to alternative D may be due to the fact that the tribunal did not consider that there was any substantial risk of infringement of that alternative, and therefore directed his attention to other possibilities of infringement. If the present proceedings had been an appeal from the tribunal's decision, it would have been the duty of this House to hear argument and evidence directed to the question whether there would or would not have been any substantial risk of infringement of alternative D, if the respondents' invention were put into operation; but the legislature has not thought fit to give a right of appeal in this case, and the tribunal's omission to deal with the question just stated does not amount to an error of law on the face of the record, whether or not the record includes the documents already mentioned.

For these reasons I would dismiss the appeal with costs.

Lord Reid. My Lords, I agree that this appeal should be dismissed and I only add some observations because I would base my decision on reasons different from those adopted by the Court of Appeal. Procedure by way of certiorari is available both where there has been "excess of jurisdiction" (which is not a very adequate description) and where error of law appears on the face of the record. But there is this difference between these classes of case: in the former the court can be informed of the whole circumstances, in the latter it cannot, and this case admittedly belongs to the latter class. The appellants can only succeed if it appears on the face of the record that the tribunal has erred in law. The question what constitutes the record and whether or how far it is permissible to look beyond the order under review is one of great importance, but one on which I find it unnecessary to express any opinion in this case. I shall therefore assume, without deciding, that this record includes all the documents which the appellants maintain that it does include—not only the decision of the tribunal but also the decisions of the superintending examiner and the specifications Nos. 658,823 and 703,630.

The question which the examiner and the tribunal had to decide was whether the invention described in the latter specification could be performed without substantial risk of infringement of claim 1 of the former specification. That is in itself a question of fact but it cannot be answered until the meaning of the relevant parts of the two specifications has been determined, and the construction of documents is a matter of law. If the record showed that the tribunal had wrongly construed the former specification I should regard that as an error of law appearing on the face of the record and therefore I think it necessary to examine the documents said to form the record.

Before doing so, I must deal with an important matter. With what knowledge or equipment is a court entitled to examine a document? A judge is supposed to know the law, the English language and such facts as are common knowledge. If he refers to authorities or dictionaries or other works dealing with these matters he can safely do so because his general knowledge enables him to check and appreciate them. But if without assistance he attempts to handle highly technical matters he may easily go astray. Some fairly simple technical matters can nowadays be considered to be common knowledge and I would not attempt to draw the line—it may alter from time to time. In this case some of the terms used are simple enough but some are certainly not. So what is a court to do if on the face of a record there are technical terms which cannot be understood without expert assistance? There may be cases where a very little assistance is all that is necessary and I would think it unfortunate if such a strict rule were laid down that the mere presence of some technicality is enough to prevent a court from proceeding further in the absence of evidence to explain it.

Technicalities crop up in a great variety of cases and, when the parties are not in dispute about them, they are often explained without evidence. Counsel give explanations and by doing so they are not giving anything away: if they were not in agreement evidence would be led. But in a case where it is not competent to lead evidence counsel could not, in my view, properly be asked to help in this way unless there is some other way for the court to get the necessary information. If his client's interests might suffer by his giving such explanation counsel is quite entitled to withhold it and the court could not proceed on information given by one side only. But there do appear to be methods by which a court can go some way in acquiring technical information without evidence, e.g., by means of an assessor.

If the court finds that there is genuine dispute and real doubt about any technical matter then I do not think that it can proceed farther without evidence. But the relevant technicalities in this case are not in dispute—I mean relevant for the purpose of examining those parts of the tribunal's decision which are said

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to exhibit an error of law. So I think that I must make that examination in light of the explanations which have been given by counsel.

Claim 1 of the appellants' specification contains four alternatives. That is apparent from the language and structure of the claim. The error in law alleged is that the tribunal misconstrued the claim and left out of account the fourth alternative. This is the alternative on which the examiner based his decision and which a fairly simple explanation aided by the diagrams in the specifications shows to be the only one at all closely resembling the respondents' invention. Of course I express no opinion whether or not full examination would disclose any real resemblance.

Parts of the decision are not very easy to follow but there seems to be no doubt that in his decision the learned judge who was the tribunal did not mention or allude to this fourth alternative. He dealt chiefly with another of the alternatives. In the end the point for decision appears to me to be this: can it properly be inferred from the terms of his decision that the learned judge misconstrued claim 1? He set out the claim in full in his decision and, if there had been any obligation on him to set out all his reasons, silence as to this alternative might have afforded ground for such an inference. But he was not bound to set out his reasons in full and all the indications are that he was well aware of this fourth alternative. It had been dealt with by the examiner and had been, we were informed, the main subject of argument before him. There is nothing to indicate that he had decided in his own mind that he ought not to or would not consider it. In these circumstances, it does not seem to me to be likely, far less to be clear, that his failure to deal with this alternative in his decision was caused by any error of law on his part. And that is sufficient to dispose of this case.

LORD TUCKER. My Lords, in this case the appellants sought to quash by certiorari a judgment of the Patents Appeal Tribunal dated January 17, 1957. The application to the Divisional Court was on the ground that the Patents Appeal Tribunal "was "acting in excess of jurisdiction and without jurisdiction and its "judgment and decision was wrong in law and bad on the face "of the said decision."

It was clear from the outset that there was no excess or lack of jurisdiction and there can be no doubt that the statute having given no right of appeal it is of no avail to allege that the decision was wrong in law. The sole remaining ground therefore was that the decision was bad on its face, and this at once presents the problem of what is the face of the decision. The appellants sought to refer, in addition to the written judgment of the tribunal, to their patent specification No. 658,823, the

respondents' patent specification No. 703,630 and the decision of the superintending examiner from which appeal had been brought to the Patents Appeal Tribunal, on the ground that these documents formed part of the "record" of the tribunal and could therefore be looked at. Your Lordships decided to look at these documents de bene esse before giving any decision as to their admissibility. Your Lordships also heard from counsel for the appellants a detailed explanation of the meaning of the specifications and of the questions at issue on the appeal. These explanations counsel for the respondents was unable to accept as he was quite properly standing on his submission that nothing could be looked at outside the judgment or, in the alternative, that these documents did not form part of the record of the tribunal.

My Lords, I agree with those of your Lordships who, having looked at these documents have come to the conclusion that there is nothing to be found therein to show that the judgment contains an error of law. It accordingly became unnecessary for your Lordships to decide whether it would have been permissible to act upon these documents if they had disclosed that the judgment was erroneous in law, and I therefore desire to emphasise that there is nothing in your Lordships' decision in the present case that can be quoted as any authority as to the meaning of the word "record" in this context or as to whether the court can or will look beyond the actual order or decision in the case of a "speaking order" to discover whether error in law exists or not, or what documents constitute "the record" if the court orders the record to be brought before it. These questions may require decision at some future date. When that time arrives it may be necessary to consider whether the word "record" in relation to certiorari to quash for error on the face means anything more than the order or decision as recorded. It is well settled that in the case of a non-speaking order or judgment it is not permissible to look beyond the record which in the language of Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*[3] is "the inscrutable face of a sphinx." Is there a difference when the order speaks but speaks with the ambiguous voice of the oracle? This may some day call for decision.

In this connection I desire particularly to reserve for future consideration certain obiter dicta on this subject made in the Court of Appeal in *Rex* v. *Northumberland Compensation Appeal Tribunal.*[4] I am not to be taken as casting any doubt on the actual decision in that case, which I think was clearly right. Nor are my reservations to be read as applying to certiorari in general. They are confined solely to certiorari to quash on the ground of error in law on the face of the recorded order or decision. Cases of excess or lack of jurisdiction properly

[3] [1922] 2 A.C. 128, 159; 38 T.L.R. 541.

[4] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

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understood as explained by Lord Sumner in *Rex* v. *Nat Bell Liquors Ltd.*[5] are clearly distinguishable although much confusion has arisen from failure to observe the distinction.

My Lords, subject to these reservations, I agree that this appeal should be dismissed.

Lord Somervell of Harrow. My Lords, I agree with the opinion delivered by my noble and learned friend, Lord Tucker. The present case shows how important the issue as to what constitutes the face, on which error must be found, may be. I have looked at a number of ancient and modern cases on certiorari and am satisfied that the point is a difficult one which should be left to be decided after full argument if and when it arises.

Lord Denning. My Lords, in the case of the appellants, an order for certiorari is sought upon the ground that there is an error of law on the face of the record. When certiorari is sought upon such a ground, evidence is not as a rule admissible. The error must appear on the face of the proceedings without the aid of extrinsic evidence.

But what is the "record" for this purpose? It is not confined to the formal record of the proceedings such as is kept by a superior court of record, which used to be enrolled on parchment in Blackstone's day and is filed at the Central Office in our day. Certiorari goes to all inferior tribunals, not only to those which are courts of record, but also to those which are not; and not only to those which kept a formal record, but also to those which do not. When certiorari issues to any of these tribunals, there must be brought before the Queen's Bench not only the formal order of the tribunal but also, as the old writ said, "all things touching "the same"; and this includes the reasons for the decision when the tribunal gives them. This goes back as far as the time of Holt C.J. In 1702 in *Ryslip Parish* v. *Hendon Parish*,[6] a case where justices had ordered a poor man to be removed from Ryslip to Hendon, he said: "Where the justices of peace do give "a special reason for their settlement, and the conclusion which "they make in point of law will not warrant the premises, then "we will rectify their judgment: but if they have given no reason "at all, then we will not ravel into the fact." The court would not compel a tribunal to give its reasons if it did not wish to do so: but if it did so, it became part of the record then, just as it does today under section 12 (3) of the Tribunals and Inquiries Act, 1958.

Your Lordships have been invited now to determine what documents are to be brought up in the case of certiorari to an appellate tribunal. Do they include the decision at first instance? To answer this question I have done as Earl Cairns L.C. did in

[5] [1922] 2 A.C. 128.

[6] (1702) Holt 572.

Walsall Overseers v. *London and North Western Railway Co.*[7] I have gone back to the old days when quarter sessions sat as an appellate tribunal on appeal from justices in civil matters. When the King's Bench issued a certiorari to quarter sessions, it was the invariable practice for the documents to include, not only the order of quarter sessions who had heard the appeal, but also the order of the justices who had heard the case at first instance, and also any other document which was recited or referred to by quarter sessions in terms which showed that it was the basis of the decision. The principle was well stated in a case in 1732 concerning a poor rate which had *not* been made part of the order of quarter sessions but had been sent back to the parish officers. Lord Raymond C.J. said: "A certiorari goes to remove the order, "and for what? Why, to see whether it be good or not, and how "can we judge whether the rate be good or not, unless we see it. "I have been for some time of opinion that when a certiorari "goes to remove orders cum omnibus ea tangen, everything ought "to be removed that may set the thing in a true light. I do not "mean every matter of fact, for that is impossible; but how can "we know whether this rate be good, unless it be returned." And Probyn J. made the pertinent comment: "To what end is "a certiorari granted, if it can only remove the order, and that "on which it is grounded cannot appear": see *Rex* v. *Uttoxeter (Inhabitants)*.[8] "That on which it is grounded" always included the decision at first instance.

This rule was not confined to cases where the quarter sessions stated the facts specially for the opinion of the court. It extended to all cases where they gave their reasons, even without stating a case. There are many cases to be found where on certiorari the Court of King's Bench had before them the reasons given by the justices at first instance, as well as the reasons given by quarter sessions on the appeal; and the King's Bench considered the two together so as to see whether an error of law was disclosed on the face of them. So it was in the days of Holt C.J. (see *Rex* v. *Alverston*[9]), and of Lord Hardwicke (see *Rex* v. *Bourn (Inhabitants)*[10]) and Lord Mansfield (see *Rex* v. *Upton Gray (Inhabitants)*[11]).

I am here speaking only of orders made by quarter sessions on appeals in civil matters. I am not speaking of convictions by justices in criminal matters at first instance: for they always were on a special footing. Before Jervis's Act the conviction itself had to contain everything. It had to set out the information, the evidence and the adjudication, as I explained in *Rex* v. *Northumberland Corporation Tribunal*.[12] And in such cases, of course, the King's Bench would not look at anything outside the conviction, —see *Rex* v. *Liston*[13]; not even at the information itself to show

[7] (1878) 4 App.Cas. 30.
[8] (1732) Cunn. 28n.; 1 Sess.Cas. K.B. 163.
[9] (1698) Holt 507.
[10] (1735) Burr.S.C. 39.
[11] (1783) Cald.Mag.Cas. 308.
[12] [1952] 1 K.B. 338, 348.
[13] (1793) 5 T.R. 338.

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a variance—see *Rex* v. *Cashiobury Justices*.[14] But in orders on appeals it was different. The court always looked at the decision at first instance to see if there was a variance, as Lord Hardwicke did in *Rex* v. *Bourn* (*Inhabitants*).[15]

Now turning to modern cases, it will be seen that, in our day, too, the courts have proceeded on the footing that there should be included in the record, not only the formal order, but all those documents which appear therefrom to be the basis of the decision —that on which it is grounded. Such as the claim for compensation in the *Northumberland* case,[16] the report of the medical specialist in *Gilmore's* case[16a] and the medical certificates in *Reg.* v. *Head*.[17] Is it really to be supposed that the Crown in those cases made concessions which it was not bound to make and could have successfully resisted the issue of certiorari? None of the counsel before your Lordships suggested it. Nor did they refer to the arbitration cases which are very different, because certiorari does not lie to arbitrators. There is no "record" to be considered. Only the award. There is no reference to "all things touching the same." But even there, the courts will look at documents which appear from the award to be the basis of the decision (see *Landauer* v. *Asser*,[18] as explained in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. Ltd.*,[19] and *D. S. Blaiber & Co. Ltd.* v. *Leopold Newborne* (*London*) *Ltd.*[20]).

Applying these principles, I think the decision of the superintending examiner should be treated as part of the record. It seems to me plain that, in order to know the ground of the decision of the Patents Appeal Tribunal, it is necessary for the court to have before it the decision of the superintending examiner. I can think of no document more closely "touching the same." Furthermore, the Patents Appeal Tribunal itself recites the decision of the superintending examiner and refers to it in terms which show that it is the very basis of the tribunal's decision, in that it is the basis from which all the reasoning of the tribunal stems. It is true that the tribunal does not confirm the examiner's decision. It reverses it. But that can make no difference. Whether confirmed or reversed, the decision is part of the record. So also with the specifications. They are the very basis of the decision.

But when your Lordships turn to consider the documents which thus form the record, there is an initial difficulty. They are full of electrical technicalities. When counsel offered to explain them, the High Court rejected his offer, saying: "We do "not go into the technical details because, if we did, we should not

[14] (1823) 3 D. & R. 35.
[15] (1735) Burr.S.C. 39, 40.
[16] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268; (C.A.) [1952] 1 K.B. 338.
[16a] [1957] 1 Q.B. 574.
[17] [1958] 1 Q.B. 132, 138; [1958] 2 W.L.R. 617; [1958] 1 All E.R. 679.
[18] [1905] 2 K.B. 184, 191; 21 T.L.R. 429.
[19] [1923] A.C. 480, 487; 39 T.L.R. 253.
[20] [1953] 2 Lloyd's Rep. 427.

"understand them." When the case reached the Court of Appeal, counsel did embark on an explanation, but the court seem to have regarded his efforts as evidence which, on an application of this kind, it was not permissible for them to receive. "We "cannot construe the specifications," they said, "without being "informed by evidence and, that being so, the application for an "order for certiorari must fail in limine."

My Lords, whenever the meaning of words arises, however technical or obscure, then, unless there is some dispute about it, it is common practice for the court to inform itself by any means that is reliable and ready to hand. Counsel usually give any necessary explanation: or reference may be made to a dictionary, which may be a general dictionary or even a technical one. If the subject-matter is too difficult to be resolved by such means, the court can always call in aid an assessor specially qualified to explain it, see section 98 of the Judicature Act, 1925, and this has been done from time to time, see, for instance, *Mercer* v. *Denne* [21] and *Esso Petroleum Co. Ltd.* v. *Southport Corporation.*[22] The one thing that the court ought not to do is to refuse jurisdiction in a case because it does not understand the technical terms employed in it. Scientists and engineers are entitled to have their rights enforced and their wrongs redressed as well as anyone else: and the court must possess itself of whatever information is necessary for the purpose. Some judges may have it already because of their previous experience. Others may have to acquire it for the first time. But in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever calls the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.

In the present case your Lordships did have the benefit of explanations by counsel and the point at issue appeared clearly enough. The appellants own a patent for an electrical device. It is numbered 658,823. The specification contains a claim defining the scope of the invention claimed by them. It includes four alternatives and is equivalent to four separate claims rolled into one which were conveniently identified as alternatives (A), (B), (C) and (D).

The respondents seek to obtain a patent for a similar electrical device. Their application is numbered 703,630. The appellants objected to this patent being granted to the respondents because they said that, if it was performed, there was a substantial risk of it infringing their patent No. 658,823.

The matter came before the superintending examiner at the Patent Office. He held that, if the respondents' invention No.

[21] [1905] 2 Ch. 538, 544; 21 T.L.R. 760.

[22] [1956] A.C. 218, 222–223; [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864.

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703,630 were performed, there was a substantial risk that it would infringe No. 658,823 by infringing alternative (D), but no risk of it infringing alternatives (A), (B) or (C). So he directed that there should be inserted in the respondents' patent a special reference which was to be in these words: "Reference has been directed "in pursuance of section 9, subsection (1) of the Patents Act, "1949, to Patent No. 658,823."

The respondents appealed from this decision to the Patents Appeal Tribunal. The tribunal reversed the decision of the superintending examiner and held that no special reference should be inserted. The judgment makes no reference to alternative (D) at all. It speaks as if the only alternative in question was alternative (B). It takes alternative (B) as "the characteristic" in dispute; and finds that, as there is no substantial risk of infringing alternative (B), the decision of the superintending examiner must be reversed.

I believe that this was apparent to some of your Lordships as soon as you had studied the decision of the tribunal in conjunction with the decision of the superintending examiner: and when you pressed Mr. Tookey upon it, he was constrained to admit the force of it. He, thereupon, to use his own words, lifted the veil and felt the better for it. "The judge has taken the wrong "alternative," he said. "He has taken alternative (B) whereas "he should have taken alternative (D). Our contentions were "never based on alternative (B) but on alternative (D). The "only explanation we can suggest is that, at the end of the argu-"ment, the judge was in our favour, but that owing to the time "which elapsed before he came to write his judgment he took the "wrong alternative." Mr. Levy, who followed Mr. Tookey on the same side, made it doubly clear that the argument before the tribunal was based on alternative (D) and not on alternative (B) at all. No one suggested that there was any risk of alternative (B) being infringed. But Mr. Tookey declared that the decision itself was correct. It was inconceivable, he said, that the judge had overlooked alternative (D). The judge must have considered it and found that there was no substantial risk of it being infringed. But he failed to mention it in his written reasons. If it were permissible to speculate on what the judge had in mind, I would agree that that is the probable explanation of what happened, but where I differ is, that I do not think it is permissible to surmise or speculate upon it. We have only the written reasons of the judge to go upon, and we cannot presume that he went by any other. It has long been decided that "when a "reason is assigned as the foundation of a judgment, all presump-"tion or intendment that the court went upon better grounds is "excluded": see Burn's Justice of the Peace, 13th ed., Vol. V, p. 324. That statement rests on the authority of Lord Mansfield himself, supported by Willes and Buller JJ., who sat beside him,

see *Rex* v. *Upton Gray*[23] and if it is correct, as I think it is, it forbids us from presuming that the judge took alternative (D) into account.

Excluding, therefore, all presumption or intendment it appears to me that the written decision of the tribunal is based on what was, in the circumstances, an extraneous consideration (namely that there was no substantial risk of infringing alternative (B)) and fails to take into account a very relevant and indeed vital consideration (namely, whether there was any substantial risk of infringing alternative (D)).

Is that an error of law? I have no doubt that it is: and it is an error of such a kind as to entitle the Queen's Bench to interfere. There are many cases in the books which show that if a tribunal bases its decision on extraneous considerations which it ought not to have taken into account; or fails to take into account a vital consideration which it ought to have taken into account; then its decision may be quashed on certiorari and a mandamus issued for it to hear the case afresh. The cases on mandamus are clear enough: and if mandamus will go to a tribunal for such a cause, then it must follow that certiorari will go also: for when a mandamus is issued to the tribunal, it must hear and determine the case afresh and it cannot well do this if its previous order is still standing. The previous order must either be quashed on certiorari or ignored: and it is better for it to be quashed.

I need not, I think, refer to the cases on mandamus, except perhaps to mention the judgment of Lord Reading C.J. in *Rex* v. *London County Council*.[24] But I must prove the point about certiorari. I can do it by several cases. In the *Board of Education* v. *Rice*,[25] the Board of Education, in coming to their decision (that the local authority had not failed in their duty), took into consideration the wrong question and failed to take into the consideration the questions which had been raised for their determination. In *Rex* v. *Pontypridd County Court Registrar*[26] the Registrars regarded £400 as the maximum compensation and failed to consider whether it was adequate. In *Rex* v. *Northumberland Compensation Tribunal*,[27] the Tribunal, in assessing compensation for loss of employment, took into account only Shaw's service with the hospital board and failed to take into account his whole service in local government. In *Reg* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Hierowski*[28] the Tribunal, in reducing the rent, took into account afresh the reasonableness of the amount charged, which was an extraneous consideration, as they should only have had regard

[23] Cald.Mag.Cas. 308.

[24] [1915] 2 K.B. 466, 475; 31 T.L.R. 329.

[25] [1909] 2 K.B. 1045; 25 T.L.R. 795; (C.A.) [1910] 2 K.B. 165; 26 T.L.R. 422; (H.L.) [1911] A.C. 179; 27 T.L.R. 378.

[26] (1948) 64 T.L.R. 73; [1948] 1 All E.R. 218.

[27] [1951] 1 K.B. 711; (C.A.) [1952] 1 K.B. 338.

[28] [1953] 2 Q.B. 147; [1953] 2 W.L.R. 1028; [1953] 2 All E.R. 4.

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to the change of circumstances. In *Reg* v. *Medical Appeal Tribunal, Ex parte Gilmore*[29] the Tribunal, in assessing compensation for industrial injury, took into consideration only the injury to the left eye and failed to take into account the prior injury to the right eye. In *Reg.* v. *Head*[30] the Secretary of State, in ordering the girl to be detained, failed to consider whether it was required for the protection of others. In *Reg.* v. *Liverpool Justices*[31] the justices, in making the adoption order, failed to consider whether there were special circumstances justifying it. In all those several cases it was held or accepted that certiorari lay to quash the decisions. In a case in the Privy Council *Seereelall Jhuggroo* v. *Central Arbitration and Control Board*[32] the principle was accepted but certiorari was refused because the Board were held not to have taken extraneous matter into account.

In some of those cases it has been said that the tribunal, in falling into an error of this particular kind, has exceeded its jurisdiction. No tribunal, it is said, has any jurisdiction to be influenced by extraneous considerations or to disregard vital matters. This is good sense and enables the court of Queen's Bench to receive evidence to prove the error. But an *excess* of jurisdiction in this sense is very different from *want* of jurisdiction altogether which is, of course, "determinable at the "commencement, not at the conclusion of the inquiry" (see *Reg.* v. *Bolton*[33]). Whereas an excess of jurisdiction is determinable in the course of or at the end of the inquiry. But allowing that a tribunal which falls into an error of this particular kind does exceed its jurisdiction, as I am prepared to do, nevertheless I am quite clear that at the same time it falls into an error of law too: for the simple reason that it has "not deter-"mined according to law." That is, indeed, how Blackburn J. put it in *Reg.* v. *de Rutzen.*[34] And the decision in the *Northumberland* case[35] itself shows that, even though no evidence is given, nevertheless if such an error appears from the documents properly before the court, or by legitimate inference therefrom, then certiorari may be granted to quash the decision: and the certiorari can properly be said to be for error of law on the face of the proceedings. It may be excess of jurisdiction as well, but it is certainly error of law.

In the present case, it is, I think, a legitimate inference, from the documents properly before the court, that the tribunal, when it came to give its written and only decision, failed to take into consideration alternative (D) which was a vital matter for consideration. It was the sole ground on which the superintending examiner had decided the case: and, before reversing his decision,

[29] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.
[30] [1958] 1 Q.B. 132, 138.
[31] [1959] 1 W.L.R. 149; [1959] 1 All E.R. 337.
[32] [1953] A.C. 151, 161.
[33] (1841) 1 Q.B. 66, 74.
[34] (1875) 1 Q.B.D. 55, 57.
[35] [1952] 1 K.B. 338.

the tribunal ought to have considered it. The failure to take it into consideration is, I think, a ground on which certiorari *may* be granted. But should it be? The general rule is undoubted that the issue of certiorari is a matter of discretion for the High Court. This was distinctly stated by the court of King's Bench in 1793 in *Rex* v. *Bass*[36] and again in 1838 in *Reg.* v. *Manchester & Leeds Railway Co.*[37] Since that time a subsidiary rule has been laid down to the effect that where the applicant is a party grieved, who has no other remedy, the court will grant it ex debito justitiae, see *Reg.* v. *Surrey Justices*[38]; *Reg.* v. *Manchester Legal Aid Committee.*[39] But if he is not a party grieved, or if, being a party grieved, he has another remedy, as for instance by appeal, then the discretion of the court remains intact to grant or refuse the order, see *Rex* v. *Harman*[40]; *Rex* v. *Cambridgeshire Justices*[41]; and this is the ground on which I would uphold the decision in *Davies* v. *Price.*[42]

My Lords, I have come to the conclusion that this is not a case in which certiorari should issue. The effect of a special reference under section 9 (1) of the Patents Act, 1949, is very limited. It is interlocutory in its nature. Even when made, it does not give the appellants any greater rights than they had before. It is more a detriment to the respondents than a benefit to the appellants. It serves as a notice to the public that there is a substantial risk of infringement. But it decides nothing as to whether there is in fact an infringement. That must still be decided in an action brought for the purpose. This was, I expect, the reason why Parliament did not think it a proper case in which to give a right of appeal to one side or the other. It left a person aggrieved to his other remedy—the new patentees could make the article and the old patentees could sue for infringement—and only then would they know for certain where they stood. And this, I must say, seems to me to be the proper remedy rather than to apply for a certiorari. I am prepared to assume that the appellants are persons aggrieved, but, as they have another remedy open to them, the court in its discretion should refuse a certiorari.

I would add this too. When the appellants saw that the tribunal had overlooked alternative (D), they might well have gone back and pointed out the error. I have no doubt that the tribunal would then have dealt with alternative (D). It might indeed have made a different order, if it thought fit to do so. It used to be competent for quarter sessions to do this if the error was brought to their notice during the same sessions,

[36] (1793) 5 T.R. 251.
[37] (1838) 8 A. & E. 413, 428.
[38] (1870) L.R. 5 Q.B. 466.
[39] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.
[40] (1739) 2 Sess.Cas.K.B. 201.
[41] (1835) 4 A. & E. 111, 123, 124, 125.
[42] [1958] 1 W.L.R. 434, 442; [1958] 1 All E.R. 671.

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see *St. Clement's Parish* v. *St. Andrew's Parish, Holborn.*[43] So also it might have been done by this tribunal if brought promptly to its notice. No more could be achieved by certiorari and mandamus. I do not know why the appellants did not do this, except perhaps that they did not think of it.

At any rate, having regard to those courses which were open to the appellants, it is not, in my opinion, a case in which certiorari should issue. On this ground, therefore, I would dismiss the appeal.

One word more. It was suggested that certiorari should be limited in view of the statutory facilities which now exist for appeals on law. But I would remark that it was only last year, by section 9 of the Tribunals and Inquiries Act, 1958, that these new statutory facilities were introduced and they only apply to a limited number of tribunals. There still remain a considerable number of tribunals and inquiries where there is no appeal: and in most of these cases Parliament has expressly provided that reasons shall be given with the very object that they should be subject to control by certiorari. Hence the reference to "the record" in section 12 (3) of the Act. In any case, the Act does nothing to limit the scope of certiorari and I should be sorry to see so beneficial a remedy cut down or limited at this point in time. There is nothing more important, to my mind, than that the vast number of tribunals now in being should be subject to the supervision of the Queen's courts. This can only be done if the remedy by certiorari is maintained in the full scope which the great judges of the past gave to it. Any anxiety about an undue extension of the remedy is fully met by the knowledge that, in cases where there is a right of appeal, the courts may in their discretion refuse the order. When there is no right of appeal, this historic remedy has still a valuable part to play: or at any rate, it should have, if we wish any longer to ensure that the rights of the people are determined according to law.

Appeal dismissed.

Solicitors: *Parker, Garrett & Co. for Burdekin & Co., Sheffield; Bristows, Cooke & Carpmael.*

F. C.

[43] (1704) 6 Mod. 287; Salk. 606.

[CHANCERY DIVISION.]

In re TATE'S WILL TRUSTS. PUBLIC TRUSTEE *v.* TATE AND OTHERS.

1959
May 5.

Wynn-Parry J.

[1954 T. No. 2172.]

Practice and Procedure—Revival of proceedings—Application for order to carry on—Proceedings worked out—Jurisdiction—Special circumstances—R.S.C., Ord. 17, *r.* 4.

A defendant, on an originating summons for the construction of a will, did not appeal from a decision that her father was absolutely entitled to the property there in question, in reliance on her father's promise that he would by his will leave her the property absolutely. He became estranged from his daughter and, on his death in 1957, he bequeathed her only a life interest in the property. Through the dilatoriness of her solicitors she was not advised until 1958 that she could apply under R.S.C., Ord. 17, r. 4, for an order that the proceedings should be carried on so that she could apply to the Court of Appeal for leave to appeal out of time:—

Held, that, in the special circumstances, the court had jurisdiction under Ord. 17, r. 4, to accede to the application notwithstanding that the proceedings had been worked out.

Dicta of Chitty J. in *Fussell* v. *Dowding* (1884) 27 Ch.D. 237, 240, 241 applied.

Arnison v. *Smith* (1889) 41 Ch.D. 348; 5 T.L.R. 413 distinguished.

PROCEDURE SUMMONS.

The applicant, Mrs. Frances Elizabeth Gaythorpe, took out a procedure summons for an order that certain proceedings by way of originating summons started in December, 1954, and on which judgment was given by Vaisey J. on April 19, 1955, to which she was the second defendant, might be carried on by the parties specified in the procedure summons.

The following were the circumstances which gave rise to the necessity of the procedure summons. The proceedings by way of originating summons were brought for the purpose of construing the will, dated January 7, 1910, of a testator, John Tate, who died on November 17, 1910. The language of the will raised some doubt as to the correct devolution of an estate known as the Bank House Estate in Northumberland, which had been in the Tate family for some considerable time; the details of the provisions of the will giving rise to the difficulty are not here relevant. An effort was made originally to arrive at a family arrangement, but that effort broke down because the elder brother of Thomas Bailey Tate, the applicant's father and the first defendant to the originating summons, insisted that in any family arrangement there should be reserved to the applicant only a life interest in the Bank House Estate. During the course of the negotiations the applicant's father made it clear to his daughter, not only orally but also in letters which were in evidence on the

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present summons, that on the assumption that he should find himself able to dispose of the whole of the estate, he would by his will provide that she should have the whole of his interest.

Following the breakdown of the effort to arrive at a family arrangement, it was decided in order to make clear beyond doubt what was the true devolution of the estate that a summons should be taken out for the construction of the will of the testator, and accordingly, in December, 1954, an originating summons was taken out for that purpose. The substantial dispute on that summons was between the first defendant, Thomas Bailey Tate and his daughter, the present applicant, and the whole question turned on whether the rule in *Shelley's* case [1] applied to the provisions of the will relating to the devolution of the Bank House Estate. Vaisey J expressed the view that it was a difficult case and a matter of some doubt, but came with reluctance to the conclusion that the rule in *Shelley's* case [1] did apply, although he said that there was much to be said for the other view; he held that the hereditaments and the capital moneys then constituting and representing the Bank House Estate were to be held in trust for the applicant's father in fee simple absolutely.

The applicant was advised that she had a right to appeal and also that there was a chance that that decision might be reversed on appeal. Wynn-Parry J. was satisfied from a consideration of the evidence that she decided not to lodge an appeal against a decision in her father's favour upon the faith of what he had said and continued to say, namely, that his will would be on the basis of leaving her his interest in the estate, which, as a result of the decision of Vaisey J., amounted to an absolute interest.

Until May, 1956, the applicant had every ground for thinking that the understanding, although in no way a binding or enforceable agreement, would be honoured by her father, with one variation to which she had no objection, namely, the interposition of a life estate in favour of her mother. But in May, 1956, she became aware that her father was intending to resile from the understanding. There had arisen some degree of estrangement between her and her father, for what reason she was unable to explain, but he became less well disposed towards her and intimated his intention to alter his testamentary dispositions, which were then so arranged as to provide that the whole of his interest in the Bank House Estate should go to his daughter, so as to provide only a life estate in her favour.

Her father died on June 7, 1957, having carried out the intention so to alter his will. In 1958 the applicant was advised that she could apply under R.S.C., Ord. 17, r. 4,[2] for an order that the proceedings should be carried on so that she could apply to the Court of Appeal for leave to appeal out of time.

[1] (1581) 1 Co.Rep. 93b.

[2] R.S.C., Ord. 17, r. 4: "Where "by reason of marriage, death or "bankruptcy, or any other event "occurring after the commencement "of a cause or matter, and causing a "change or transmission of interest "or liability, or by reason of any

She now asked for an order that the proceedings started by way of originating summons might be carried on between the plaintiff thereof, the Public Trustee, and herself against Elsie Tate and Thomas Lancelot Williamson, the third and fourth defendants respectively, Grindley's Bank Ltd. and Charles Ian Mitchell Percy, two of the executors and trustees of her father, and the defendant, Elsie Tate, in her additional capacity as the remaining executor and trustee of Thomas Bailey Tate in the like manner as such proceedings might have been carried on between the plaintiff, her father, herself, Elsie Tate and Thomas Lancelot Williamson, if her father had not died.

E. J. A. Freeman for the applicant.

A. Lloyd Stott for defendants opposing the application, Elsie Tate and Thomas Lancelot Williamson.

The following case, in addition to those cited in the judgment, was referred to in the argument: *Ashley* v. *Taylor*.[3]

WYNN-PARRY J. stated the facts set out above and continued: It may be asked why the applicant did not, in May 1956, take some categorical step, and, in particular, why she did not at once go to solicitors. She did in fact make an effort to persuade her father to honour the understanding. I regard that as a perfectly natural—indeed, a proper—course for a daughter to have taken. When, however, she found that her father's mind was apparently made up, she sought legal advice. According to the evidence before me, she failed to obtain that advice through delay and dilatoriness on the part of the solicitors then acting for her, so that no advice had been obtained by her as to what she could do in the circumstances before the death of her father in June 1957. Before his death, she could have applied to the Court of Appeal for leave to appeal out of time. With his death, of course, a further difficulty stood in her way, and it was not until some time in 1958 that she was advised that she could take the step which she has now taken.

The evidence is not specific in showing when the applicant consulted her solicitors but there is unchallenged evidence that the period between the applicant learning in May 1956 that her father was changing his intentions and his death in June 1957

"person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the court or judge, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence."

[3] (1878) 10 Ch.D. 768.

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is to be explained first by her endeavours to persuade him and secondly by the delay on the part of her solicitors. I am entitled, and indeed bound, in the absence of any challenge to that evidence, to accept that explanation.

Two main points have been debated. First, whether or not there is any jurisdiction, apart from the existence of any special reasons, to make an order such as that which the applicant now seeks, and secondly, assuming that there is such jurisdiction, do the facts which I have recited constitute sufficiently special circumstances to justify my making that order?

So far as the question of jurisdiction is concerned, the matter must be based on R.S.C., Ord. 17, r. 4.

[His Lordship read Order 17, rule 4 and continued:] Mr. Stott submitted that one need go no further than a consideration of the language of that rule in order to come to a conclusion that where proceedings have been worked out all jurisdiction to direct that they should be carried on has gone. But I do not think that the matter is capable of decision by such a short cut. In *Fussell* v. *Dowding*[1] Chitty J. had before him an application for an order to revive a suit or to carry on the proceedings for the mere purpose of appealing against a decree in 1872, the application being made to him in 1884. The facts are succinctly stated in the headnote[2]: "By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime then for the husband for his life, and subject thereto for such persons as should be of the wife's own kindred as she should by will appoint, and in default of appointment for such persons as would be entitled under the Statutes of Distribution, in case she had died intestate and unmarried. The marriage was dissolved in 1871, and in 1872 the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the wife disposed of the property as if it was her own absolutely, and died in 1881, in the lifetime of her late husband"; and it was held that "in the absence of special circumstances, the next-of-kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings therein for the mere purpose of appealing against the decree of 1872." The first step in that matter was an application by way of motion to the Court of Appeal for leave to appeal from the decree dated July 12, 1872, and on the hearing of the motion the court directed it to stand over in order to enable the applicant to

[1] (1884) 27 Ch.D. 237. [2] Ibid.

make such application as she might be advised to revive the suit. It was in those circumstances that the motion to revive the suit was launched and brought before Chitty J. Counsel for the surviving trustee of the settlement, in the course of his argument, said [3]: "The decree in this suit has been fully "worked out, and there remains nothing more to be done in "the suit. The court will not allow a suit to be revived for "the mere purpose of an appeal." In the course of his judgment, Chitty J. said [4]: "Now the applicant avowedly asks for "an order to revive simply for the purpose of appealing; when "I say 'revive,' I mean to carry on the proceedings. The rule "under which the present application is necessarily made is "rule 4 of order 17, and, passing by the introductory matter, "I refer to the rule for the purpose of reading these words only, "'where . . . it becomes necessary or desirable that any person "'not already a party should be made a party,' an order may "be obtained. It seems to me that the court has a discretion "in making the order, and the applicant is bound to show that "it is either necessary or desirable for the purpose of working "out the decree. In this case the decree admittedly has been "worked out, and a transfer of the funds has been made years "ago. The only object, therefore, is that there may be an "appeal from the decree. It appears to me, having regard to "the observations which fell from the late Master of the Rolls "in *Curtis* v. *Sheffield*,[5] that in cases of this kind, where the "only object of a party asking for an order is to appeal, and "where there are no special circumstances in the case, where, "for instance, there is no suggestion of collusion or fraud, or "the like, and where there is no irregularity, as there was in "the case of *Walmsley* v. *Foxhall*,[6] where the decree had "erroneously dealt with future rights, the right rule to be "observed is this, that such an order should not be made after "the expiration of the time which is limited now for an appeal, "namely, one year." Later he said [7]: "I think that the application ought not to succeed, that it certainly is not 'necessary' "nor, in my opinion, 'desirable' that such an order should "be made."

As I read the judgment of Chitty J., it proceeded upon the basis that the circumstance that a suit had been fully worked out and nothing more remained to be done in the suit was not of itself a good ground for refusing to make an order to carry on the proceedings, and that if special circumstances could be shown to exist, then the court, in the exercise of its discretion, could make an order to carry on. In other words, his judgment must be taken to proceed on the basis that the mere fact that the suit has been worked out does not take away all jurisdiction from the court.

[3] 27 Ch.D. 239.
[4] Ibid. 240, 241.
[5] (1882) 21 Ch.D. 1.
[6] (1863) 1 D.J. & S. 451.
[7] 27 Ch.D. 241.

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The difficulty with which one is at first confronted is the observations of the Court of Appeal in *Arnison* v. *Smith*.[8] In that case 54 shareholders having separate causes of action brought an action against the directors of a waterworks company, claiming damages for misrepresentation in the prospectus of the company. The action came on for trial before Kekewich J. on August 3, 1888, but the solicitor for the plaintiffs was not aware until after the commencement of the trial that two of the plaintiffs had died before the trial. No application was made to postpone the trial, and judgment was given for the defendants and the action dismissed. Later, the executors of the two deceased plaintiffs applied to Kekewich J., under R.S.C., Ord. 27, rr. 2 and 4, that the executors might be made parties and the action might be carried on between them and the defendants. That was refused by Kekewich J. and the matter was taken to appeal. Cotton L.J. stated that the difficulty in the case was that the action was at an end and there were no proceedings pending to which the two plaintiffs were parties before their deaths. He pointed out, in reference to the decision of Bramwell L.J. in *Booth* v. *Briscoe*,[9] which had been relied upon, that the judgment, rightly understood, had no bearing upon the present question. He said[10]: "As a matter of fact, "there were not separate actions in that case, but the plaintiffs "had separate causes of action, and the new rules gave power "to persons having separate causes of action to join in one "action. Lord Bramwell nowhere said in his judgment that "there were eight separate actions, but that there were eight "separate causes of action, and that the plaintiffs might have "brought eight separate actions. But they did, in fact, bring "one action, and in that action took a judgment for all the "plaintiffs for forty shillings damages. If they had properly "considered their position, they would have remembered that "though there was one action there were eight separate causes "of action, and have had the damages severally assessed. There-"fore, that case does not affect this question, whether there can "be an order to revive after final judgment has been given. In "my opinion the action could not be continued after final judg-"ment. It would be giving the executors of the plaintiffs power "to go on with proceedings which would be entirely different "from the action which was pending at their death. That "cannot be done under rule 4. All that can be done under "that rule is to carry on the action, but that is the action," referring to the case before him, "of the fifty-four plaintiffs. "It does not mean that after final judgment has been given "the representatives of deceased plaintiffs can maintain a "separate action against the defendants. The effect would be "to put the defendants in peril again at the suit of those who

[8] (1889) 40 Ch.D. 567; 5 T.L.R. 413.

[9] (1877) 2 Q.B.D. 496.

[10] 40 Ch.D. 567, 569.

"did not appear at the trial." Later he said[11]: "If any "question were to arise respecting the Statute of Limitations, "we should have to consider what ought to be done, but in "this case that question does not arise." He recognised that the position was such that a new action could be brought by the representatives of the two plaintiffs, and that may in itself be a ground for explaining the course which was taken and may be itself a ground for distinguishing that case from *Fussell* v. *Dowding*.[12] Indeed, in the Annual Practice for 1959, the notes to R.S.C., Ord. 17, r. 4, state: "Where, as in *Salt* v. "*Cooper*,[13] it can properly be said that even after judgment "there is a cause or matter pending, an order to continue "proceedings might possibly be made, but not in such cases "as *Arnison* v. *Smith*,[14] where, two of several plaintiffs with "separate causes of action having died before trial, the action "was dismissed in ignorance of their deaths, and an order by "the executors of the deceased to carry on proceedings was "refused on the ground that a fresh action might be brought."

Further, Lindley L.J. said[15]: "I am not prepared to go "quite so far as Cotton L.J. in saying that the court has no "power to do what it is now asked to do. But the question "here is whether there is anything in the circumstances of this "case to render it necessary or desirable . . ." and he decided against the application on the ground that it was neither necessary nor desirable that the application should be granted.

Lopes L.J. said[16]: "Having regard to the language of the "fourth rule of order 27, I doubt if the rule applies after judg-"ment, when the action is at an end, and there is nothing "more to be done under it. But assuming that we have "jurisdiction I am not satisfied that this is a case in which it "is necessary or desirable to exercise it."

As a judge of first instance, I am bound to come to the conclusion that the ratio decidendi of Chitty J. in *Fussell* v. *Dowding*[17] is binding on me, namely, that even though an action has been worked out, there is jurisdiction to accede to an application to revive it or to carry on proceedings if the necessary special circumstances are shown. The sole question on the law, therefore, is whether or not I am to treat what was said by the Court of Appeal in *Arnison* v. *Smith*[18] as in effect overruling the ratio decidendi in *Fussell* v. *Dowding*.[19] I have come to the conclusion that it would not be right for me, sitting at first instance, to give that reading to the observations, and particularly those of Cotton L.J., in *Arnison* v. *Smith*,[20] and if the clear ratio underlying the judgment of Chitty J. in *Fussell* v. *Dowding*[21] is to be regarded as no longer sound in law, that

[11] 40 Ch.D. 567, 570.
[12] 27 Ch.D. 237.
[13] (1880) 16 Ch.D. 544.
[14] 40 Ch.D. 567.
[15] Ibid. 567, 570.
[16] Ibid. 571.
[17] 27 Ch.D. 237.
[18] 40 Ch.D. 567.
[19] 27 Ch.D. 237.
[20] 40 Ch.D. 567.
[21] 27 Ch.D. 237.

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is a matter which, upon a proper application, should be pronounced upon by the Court of Appeal. I proceed, therefore, upon the basis that I have the necessary jurisdiction to accede to this application should I conclude, in the exercise of my discretion, that it is proper to do so.

That brings me back to the question of the facts, and whether they can properly be regarded as "special circumstances" in the sense in which those words were used by Chitty J. In considering the effect of the evidence, it is desirable to bear in mind a phrase in the judgment of Jessel M.R. in *Curtis* v. *Sheffield*[22]: "The recent decisions as to special circumstances "excepting the appellant from the obligation to appeal within "one year, have been very stringent; I need not refer to them, "because everybody knows them, and they all lay down this "principle, that as a general rule an appeal after the time will "not be allowed unless the respondent has done something to "give a sort of equity to the appellant to go beyond the period." Those words, it is true, would primarily be a matter for consideration by the Court of Appeal if I were to accede to the application; but they are relevant to be taken into consideration on this application, because it is an application for the purpose of placing the applicant in a position to make the necessary application to the Court of Appeal for leave to appeal out of time.

I have stated the relevant facts, and given careful consideration to the question whether they can be regarded as special facts. It is true that it is my duty to pronounce one way or the other upon that question, but I cannot shut my mind to the fact that if I were to accede to this application the defendants, apart from any question of costs, which could be dealt with by a proper order, could hardly be prejudiced. That is not of itself a matter of any relevance on the question as to whether special circumstances exist, but I point out that if I were to refuse this application, then I shut out the applicant in limine.

I have come to the conclusion, not without a little hesitation, that in this case the evidence which I have reviewed can properly be regarded as special circumstances. Having said that, the less I say now, the better, because it will be, so far as the future course of this matter is concerned, for the Court of Appeal to decide whether or not the matter should go further. I desire to deal only with the matter before me, namely, should this preliminary step be allowed; and, for the reasons which I have given, I propose to make the order that is asked for on this summons.

Order accordingly.

Solicitors: *Slaughter & May; Robinson & Bradley for Charles Percy & Son, Alnwick.*

I. G. R. M.

[22] 21 Ch.D. 1, 5.

[HOUSE OF LORDS.]

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. AND OTHERS . . . APPELLANTS;

AND

ULSTER FARMERS' MART CO. LTD. . . RESPONDENT.

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April 20, 21, 22, 23, 27; *May* 14.

ULSTER FARMERS' MART CO. LTD. . . APPELLANT;

AND

SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. AND OTHERS . . . RESPONDENTS.

Market—Disturbance—Rival market—Purchase outside—Market in live pigs and pig carcases—Scheme between Ministry and co-operative society whereby live pigs and pig carcases sent to society's premises —Whether rival market—Object of scheme not the evasion of tolls—Whether any other form of disturbance.

The respondent company was the owner of the market place and market rights at Enniskillen, in the county of Fermanagh, Northern Ireland. The company's rights as market owner extended to numerous commodities including live pigs for slaughter of bacon weight and pig carcases. Prior to 1934 the market in pigs was confined to carcases. In 1933 an organisation called "the Pigs Marketing "Board" was established under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933, for the purpose of buying live pigs from producers. It had a monopoly of the purchase of live pigs of bacon weight in Northern Ireland and it distributed them to bacon curers throughout that area. In 1940 the Ministry of Agriculture for Northern Ireland became the sole purchaser of live pigs for slaughter, and also the sole lawful buyer of pig carcases under the provisions of the Pig (Sales) (Northern Ireland) Order, 1940, which, however, authorised the Ministry to licence bacon curers to buy carcases themselves. The appellant society and other bacon curers were so licensed by the Ministry and they attended the market at Enniskillen and bought carcases there up to July 15, 1948. Before that date the society had no abattoir of its own, but brought certain live pigs by arrangement with the Ministry to the then market owner's abattoir for slaughter. This abattoir was closed down in 1947 and was not purchased by the company when it acquired the market rights from the former market owner in that year. Between 1934 and 1948 certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, the Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcases which were sold outside the market. In 1946 the society obtained permission from the Ministry to build an abattoir of its own, and the Ministry undertook to use the society's premises at Enniskillen as the principal collecting centre for County Fermanagh to which producers could bring live pigs which they had for sale. On July 19, 1948, the society's new premises were opened and the new scheme, following an advertisement in the local press, came into operation, under which live pigs bought by the Ministry were transported to the society's abattoir either at a subsidised

† *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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rate or at the producer's own expense, and pigs killed on the farms were accepted by the society to be delivered at the producer's expense. After July 19, 1948, neither the society nor the Ministry had attended at the company's market and no person attending there had been able to sell pigs of bacon weight by reason of the absence of the society and the Ministry, or to sell pig carcases because of the absence of all persons authorised to purchase. Further, since that date, the society and the Ministry had ceased to pay the market owner any sum for or in lieu of tolls, and the company's claim for tolls in respect of pigs passing through the society's premises had been met by the plea that no such tolls were payable.

In an action by the company against the society, the Ministry and others, for alleged disturbance of its market rights by levying a rival market and otherwise:—

Held, (1) that there was no levying of a rival market as the society's premises did not provide facilities for a concourse of buyers and sellers which was the esssential feature of such a market.

Great Eastern Railway Co. v. *Goldsmid* (1884) 9 App.Cas. 927, and observations of Chatterton V.-C. in *Downshire* v. *O'Brien* (1887) 19 L.R.Ir. 380, 390 applied.

(2) That there was no other actionable form of disturbance, for it could not be suggested in the circumstances that the object of the scheme was to evade the payment of toll. A sale outside the market which had or might have the effect of depriving the market owner of toll or some other advantage was an actionable disturbance only if the person selling took or sought to take the benefit of the market; accordingly, the claim failed.

Decision of the Court of Appeal in Northern Ireland reversed in part.

APPEAL and CROSS-APPEAL from the Court of Appeal in Northern Ireland (Lord MacDermott C.J., Black L.J. and Sheil J.).

This was an appeal from the order of the Court of Appeal in Northern Ireland dated May 15, 1958, insofar as it allowed the appeal of the respondent, the Ulster Farmers' Mart Co. Ltd., from the judgment and order of the trial judge, Curran L.J., dated February 22, 1957, in an action wherein the appellants, the Scottish Co-operative Wholesale Society Ltd., the Right Honourable Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland and others (not parties to this appeal) were defendants and the respondent was plaintiff and insofar as the Court of Appeal by its order directed judgment in favour of the respondent in the action and directed certain inquiries as to damages and restricted the first named appellant from purchasing certain commodities at its premises in Enniskillen without the permission of the respondent. By petition of cross-appeal the respondent sought to have set aside those portions of the judgment of the trial judge which the Court of Appeal affirmed in favour of the appellants. The issue in this appeal was whether or not the activities of the appellants as established in the action were, and continued to be, an actionable interference with the respondent's market rights. The commodities in question in these proceedings were live pigs for slaughter (of bacon weight) and pig carcases for manufacture into bacon.

The facts are set out in the opinion of Viscount Simonds.

C. Nicholson Q.C., *E. W. Jones Q.C.*, *R. L. E. Lowry Q.C.* and *J C MacDermott* (of the Bar of Northern Ireland) for the appellants.

W. F. Patton Q.C., *J. A. Brown Q.C.* and *B. Kelly Q.C.* (of the Bar of Northern Ireland) for the respondent.

The following cases, in addition to those referred to in their Lordships' opinions, were cited in argument: *Fearon* v. *Mitchell* [1]; *Mayor of Dorchester* v. *Ensor* [2]; *Stretch* v. *White* [3]; *Hopkins* v. *Great Northern Railway* [4]; *McCutcheon* v. *Carney* [5]; *In re Islington Market Bill* [6]; *London (Mayor of)* v. *Low* [7]; *Manchester Corporation* v. *Lyons* [8]; *Yard* v. *Ford* [9]; *Middleton* v. *Power* [10]; *Cork Corporation* v. *Shinkwin* [11]; *Bailiffs of Tewkesbury* v. *Diston* [12]; *Birmingham Corporation* v. *Foster* [13]; *Central Control Board* v. *Cannon Brewery Co.* [14]

Their Lordships took time for consideration.

1959. May 14. VISCOUNT SIMONDS. My Lords, in June 1947 the respondents Ulster Farmers' Mart Co. Ltd., whom I will call "the respondents," became possessed of the exclusive right in fee simple by letters patent dated respectively May 28 in the tenth year of the reign of King James I and February 20 in the fifty-third year of the reign of King George III to hold markets and fairs in or at Enniskillen in the county of Fermanagh and to exercise all the rights set forth in the said letters patent. And they have at all material times held twelve fairs in every year and a market each Tuesday and Thursday in every week in exercise of the rights conferred by the said letters patent and of rights exercised by them and their predecessors in title from time immemorial or conferred by letters patent which have been lost or destroyed by accident. This statement of relevant fact I take from an agreed statement of facts in the action, out of which this appeal arises, and I do not think it necessary to examine further the origin or nature of the franchise except in one respect with which I will deal hereafter. It is, however, proper to mention that in the original grant there appeared a provision which the Lord Chief Justice (Lord MacDermott) called "the prohibition." It is a peculiar provision such as I do not remember to have seen before either in the grant of a franchise of market or elsewhere and it was at one time thought to have some importance, but at the hearing of this appeal it faded out and I will say no more about it.

1 (1872) L.R. 7 Q.B. 690.
2 (1869) L.R. 4 Exch. 335.
3 (1861) 25 J.P. 485.
4 (1877) 2 Q.B.D. 224.
5 [1938] Ir.Jur.Rep. 73.
6 (1835) 3 Cl. & Fin. 513.
7 (1879) 49 L.J.Q.B. 144.
8 (1882) 22 Ch.D. 287.
9 (1670) 2 Saund. 172.
10 (1886) 19 L.R.Ir. 1.
11 (1825) Sm. & Bat. 395.
12 (1805) 6 East 438.
13 (1894) 70 L.T. 371; 10 T.L.R. 309.
14 [1919] A.C. 744.

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Such being their market rights on December 19, 1949, the respondents, being aggrieved by the transactions to which I will presently refer, issued a writ against the Scottish Co-operative Wholesale Society Ltd., the Right Honourable Reverend Robert Moore and the Ministry of Agriculture for Northern Ireland (whom I will call respectively "the society," "the Minister" and "the Ministry") and certain other persons and bodies, who are not parties to this appeal, claiming a declaration in respect of their market rights, a declaration that the respondents had disturbed them in their said rights by the levying of a rival market and otherwise, damages for such disturbance and the appropriate injunctions and in addition damages for conspiracy.

Before I come to the circumstance which immediately gave rise to the action, namely, the opening of a new modern abattoir and the establishment of a live pig collecting centre at the society's factory in Enniskillen on July 15, 1948, I must state a few facts which are not in dispute.

The respondents' market rights extended to numerous commodities but this case is concerned with only two of them, live pigs for slaughter of bacon weight and pig carcases. The first of these was not sold in the market or, it was said, anywhere in Northern Ireland, before 1934, and it was suggested that it was not a commodity to which market rights extended. This view was not accepted by Curran J. who tried the case, or by the Court of Appeal and I see no reason to differ from them. Up to 1934 therefore the market (so far as relevant) was a dead pig or carcase market and was held every week on Tuesdays only. Live pigs were sold as stores at the monthly fairs.

In the year 1933 an organisation called "the Pigs Marketing "Board" was established under the provisions of the Agricultural Marketing Act (Northern Ireland), 1933, for the purpose of buying live pigs from producers. It had a monopoly of the purchase of live pigs of bacon weight in Northern Ireland and it distributed them to bacon curers throughout that area.

On January 15, 1940, the Ministry, as agent for the Ministry of Food under and by virtue of the provisions of the Pig (Sales) (Northern Ireland) Order (being S.R. & O. No. 39 of 1940 made under the authority of regulation 55 of the Defence Regulations, 1939), became the only person authorised to purchase live pigs for slaughter in Northern Ireland, thus succeeding to the Pig Marketing Board's monopoly. By virtue of the same Order it also became the sole lawful buyer of pig carcases but was authorised to license bacon curers to buy carcases for themselves. It did so license the society and other bacon curers who attended the carcase market on Tuesdays and bought carcases there. This was until July 1948. It had in the meantime been enacted by S.R. & O. No. 1080 of 1947 (made under the authority of the same Defence Regulation) that no person might slaughter a pig for manufacture to bacon except for sale to a licensed curer.

I must now say a few words about the position of the society.

It was at all material times a licensed bacon curer but it had before July 1948 no abattoir of its own. By arrangement with the Ministry it brought live pigs to the then market owner's abattoir for slaughter. This abattoir was closed down in the year 1947 and was not purchased by the respondents when they acquired the market rights in that year. Between 1934 and 1948 certain arrangements were made between the market owners on the one hand and the Pigs Marketing Board, the Ministry and the society on the other, under which payments were made to the market owners in respect of live pigs and carcases which were sold outside the market. It has not been suggested that the rights of the parties were in any way affected by these payments.

I come now to the year 1948, reminding your Lordships that up to that time the carcase market was still active though the society, mainly if not entirely, made its purchases outside and had the carcases taken direct to its own premises. In 1948 a scheme (a word that I use in no sinister sense) which had for long been under consideration by the Ministry and the society was brought into operation. I can best describe the salient features of this scheme by a citation from the judgment of the Lord Chief Justice, to whom the House is indebted for a clear and exhaustive exposition of the facts. This is what he says: "The outcome of the negotiations between the society and the "Ministry was that the necessary alterations and extensions were "made at the society's premises [i.e., the building of an abattoir "and enlarged storage space with refrigeration and modern "machinery] and the Ministry then transferred its live pig "collecting centre there. The new project, as I shall call it, "came into operation on July 19, 1948, following an advertise-"ment in the local press inserted with the knowledge and "approval of the Ministry.

"This advertisement announced the opening of the society's "new abattoir and that the Ministry's live pig receiving depot "would be established there and would provide for the accept-"ance of live pigs from producers in County Fermanagh and part "of County Tyrone. Then came a statement to the effect that "live pigs would be conveyed from the farm to the abattoir by "the Northern Ireland Road Transport Board at an 'all-in' "charge of 8d. per pig but that producers who wished to deliver "their own pigs to the abattoir would not have to pay this "charge. The advertisement next gave the basis on which live "pigs would be paid for by the Ministry, and after that it in-"formed producers that what they had to do, if they wanted "the transport service offered for pigs ready for slaughter, was "to give notice by postcard or telephone not later than the Friday "morning prior to the week of the required uplift to the society's "office or the Transport Board's office or to one of the three "named agents who included the defendants Messrs. Noble & "Thompson [who are no longer parties to the proceedings]. The "advertisement then ended by announcing that the society 'are

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" ' still prepared to accept farm killed pigs delivered at producer's
" ' expense to their premises. These will be paid for at current
" ' official prices for dead pigs.' "

The learned Chief Justice then pointed out that one of the attractions of the new project as thus advertised was undoubtedly the cheap transport facilities it made available. It was in fact clear that such transport was heavily subsidised. He summed up the situation in words upon which I cannot hope to improve: "The result of this has been twofold: no sale of live pigs for "slaughter has been possible in the market for there have been "no competent buyers and the sale of dead pigs has stopped "for the same reason. Since July 19, 1948, the society and "the Ministry have ceased to pay the market owners any sum "for or in lieu of tolls and the plaintiffs' claim for tolls in "respect of pigs passing through the society's premises has been "met by the plea that no such tolls are payable. There cannot "be any doubt that the effect of the new project as it has been "operated has been to make most producers in the area sell "their bacon pigs alive instead of dead and to withdraw the "bacon pig trade from the plaintiffs' market." It was in fact clear that the respondents' market rights in carcases had, as Curran J. had observed, been rendered valueless as the direct result of the scheme.

In these circumstances the question arises whether the transaction, in which the Ministry and society were thus involved, though it might otherwise be regarded as a legitimate trading transaction, and, beyond that, beneficial to the community by means of a reduction in the handling of pigs and a consequent improvement in their quality and the making of economies in their collection, was yet actionable as a disturbance of the respondents' market rights. The course which the action has taken precludes me from dealing forthwith with the case as on a single issue. For, though Curran J. dismissed the whole action, a distinction was made in the Court of Appeal, which admitted the claim to the extent that I will now indicate. It will be remembered that the advertisement to which I have referred offered to producers the choice of sending live pigs to the society's premises by means of transport provided by the Ministry or by means of transport provided by themselves. The Court of Appeal decided that, when producers adopted the first alternative, no actionable wrong was committed by the society or the Ministry, but that, when the second alternative was adopted and the Ministry sold to the society the pigs thus delivered at the society's premises, there was a disturbance of the respondents' market for which the society and the Ministry were liable in damages. Similarly, the Court of Appeal held that the purchase by the society of dead pigs delivered by producers at their premises was a disturbance by the society of the market and an actionable wrong. Hence your Lordships are faced with an appeal by the society and the Ministry against one part, and a

cross-appeal by the respondents against another part, of the judgment.

My Lords, before I consider whether there is any justification for the differentiation made by the Court of Appeal, I must examine somewhat more closely the nature of the respondents' claim that their market rights have been disturbed. In what way, it must be asked, have they been disturbed? "Disturbance of a market" says the classic textbook (Pease & Chitty, on Law of Markets and Fairs, 2nd ed., p. 62) "may be either "by unlawfully setting up a rival market, or by doing some "other act or acts whereby the market-owner is deprived, either "wholly or in part, of the benefit of his franchise." The respondents accordingly followed the traditional path by alleging a disturbance by the appellants of their market by the levying of a rival market or otherwise. It was the levying of a rival market that they put in the front of their case and that was the only disturbance which was the alleged subject of conspiracy. It was also the ground upon which they obtained a partial judgment in their favour from the Court of Appeal. It was, however, open to them to establish disturbance otherwise and it was to this aspect of the case that their argument before your Lordships was largely directed.

I will deal first with the allegation that the appellants levied a rival market. In my opinion the respondents fall far short of establishing anything of the kind. Once more I will cite Pease & Chitty (p. 65): "What is a rival market is a question of "fact. To sustain an action for disturbance by setting up a "rival market, it is not necessary to show that the defendant "has set up what purports to be a legal market, or has usurped "a franchise on the Crown by taking toll or holding a court of "pie powder. It is enough that he has erected stalls on his own "soil and taken rents in the nature of stallage for their use by "persons bringing their goods thither for sales, or has so used "his land as to encourage and provide for a concourse thereon of "buyers and sellers; for instance, by establishing a depot with "conveniences for the benefit of buyers and sellers, or by holding "public auctions or sales whereby persons are provided with a "means of selling their goods without bringing them to market. "Where, however, he does not publicly invite sellers indiscriminately but sells the goods of others under contract or by private "arrangement he is not levying a rival market but is selling "outside the market." It appears to me, my Lords, that this is an accurate and sufficiently exhaustive statement of the law and that it is supported by the cases that were cited at the Bar, of which I mention only *Great Eastern Railway Co.* v. *Goldsmid*,[1] *London Corporation* v. *Lyons, Son & Co. (Fruit Brokers) Ltd.*,[2] *Mayor of Dorchester* v. *Ensor*,[3] *Elwes* v. *Payne*,[4] and

[1] (1884) 9 App.Cas. 927; sub nom. *Goldsmid* v. *Great Eastern Railway Co.* (1883) 25 Ch.D. 511.
[2] [1936] Ch. 78; 51 T.L.R. 563.
[3] (1869) L.R. 4 Exch. 335.
[4] (1879) 12 Ch.D. 468.

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Wilcox v. *Steel*.[5] In the passage that I have cited, as over and over again in the cases that support it, the essential feature of a rival market is said to be the provision of facilities for a concourse of buyers and sellers. This follows logically from the nature of a franchise of market of which no better definition has been given than by Chatterton V.-C. in *Downshire* v. *O'Brien*[6]: "A market is properly speaking the franchise right of having a "concourse of buyers and sellers to dispose of commodities in "respect of which the franchise was given."

Let me then examine the class of case which is the subject of the cross-appeal, viz., where the producer has availed himself of the transport facilities provided by or on behalf of the Ministry. The learned Lord Chief Justice has held (and Black L.J. agreed with him) that in such a case, the sale to the Ministry having taken place at the farm at which the live pigs were delivered, there was so far no disturbance of the respondents' market rights. The market owners never had the right to prevent a farmer from selling privately on his farm, whether the sale was of one or two or a large number of pigs. Equally the same learned judges were of opinion that neither by bringing all the pigs so bought to the society's premises as a collecting centre nor by then selling them, whether before or after slaughter, to the society did the Ministry or the society in any way establish a rival market to the disturbance of the respondents' rights. It appears to me that this conclusion is unimpeachable, and the only criticism that I venture to make, which becomes of importance in considering the next class of case, is that the learned Chief Justice appears to me to attach too much significance to the fact that the sale takes place at the place at which the pigs are delivered to the transport authority or other agent of the Ministry. This, therefore, brings me to the second class of case, where the producer brings the live pigs to the society's premises by his own transport.

My Lords, the learned Lord Chief Justice proceeded to the consideration of this class of case upon the basis that the contract for sale of the pigs took place on the society's premises. He found that this created a radically different situation and held that it would be quite wrong and unrealistic to regard transactions induced by the invitation contained in the advertisement as private sales on private premises. He thought that the result was to make the society's premises a concourse of sellers though not of buyers but was of opinion that the one-sided nature of the concourse facilities did not prevent what had been done in this connection constituting a rival market. Here, my Lords, I must reluctantly differ from the Lord Chief Justice. I am by no means satisfied, from an examination of the relevant documents, that in this second class of case as in the first, the sale does not take place at an earlier date, viz., when the Ministry acknowledges

[5] [1904] 1 Ch. 212.

[6] (1887) 19 L.R.Ir. 380, 390.

the producer's so-called "entry of pigs" and directs him to arrange to deliver them to a named place or person on a named day. This view, I believe, commends itself to some of your Lordships. If so, there is an end of the differentiation between the two classes of case. But, whether this is so or not, I cannot accede to the view that a rival market is levied even if the sale to the Ministry takes place on the society's premises and the Ministry (as the fact is) then sells to the society the pigs it requires and dispatches any surplus to Belfast. It is true upon this assumption that a number of sellers take their produce to the same premises, though it would be a misuse of language to speak of a "concourse" of sellers. But apart from this there does not appear to be any single feature of a market. So far from there being a concourse of sellers and buyers, the public had no right to enter upon the society's premises in order to buy: and not only had they no right to enter but entry would have availed them nothing, for the Ministry, as they were well entitled to do, made their own arrangements for the disposal of the pigs. No doubt there have been cases where a rival market has been held to be established when all the sales have been made by a single auctioneer acting on behalf of a number of sellers, but such cases are remote from the present case and must, in any event, in view of the observations of Maugham L.J. in *London Corporation* v. *Lyons, Son & Co. (Fruit Brokers) Ltd.*,[7] be very closely scrutinised.

What I have said about the second class of live pigs applies also to the sale of carcases to the society. In this the Ministry have no part. The society advertises its willingness to buy carcases: the producers bring them to its premises. The society takes them, pays for them, and uses them for its own purposes. I will presently examine whether this can in any other way be regarded as a disturbance of the respondents' market, but to the proposition that it is a disturbance by levying a rival market I can by no means assent. I sum up this part of the case, therefore, by saying that the respondents fail in respect of both classes of live pigs and of carcases to make good their claim of disturbance by a rival market.

But, my Lords, this does not conclude the case; for, as I pointed out some time ago, disturbance may take some other form than levying a rival market. This aspect of the case has caused me the difficulty that is commonly created when it is sought to pour new wine into old bottles. For let it be said at once that there is no case in the books which in its facts remotely resembles the present one. Counsel for the respondents, taking as their text the latter part of the first citation that I made from Pease & Chitty, contended that since there may be disturbance of a market by doing an act whereby the market owner is deprived either wholly or in part of the benefit of his franchise, it was sufficient to look at the sequence of events and thus

[7] [1936] Ch. 78.

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conclude that, but for the scheme operated by the Ministry and the society, pigs live or dead which went direct to the society's premises would or might have found their way to the respondents' market. This means nothing less than that any act which may result in a loss to the market owner is an injury to him: it leaves no room for the damnum absque injuria which is a commonplace in a trading community: and it is in fact a proposition of law for which there is no foundation. If it was well founded, no shopkeeper or indeed any private person could buy or sell any marketable article within market limits: a view at one time held, at least in regard to sales on market days, but long since discarded: see *Mayor of Macclesfield* v. *Chapman*,[8] and see, too, *London Corporation* v. *Lyons, Son & Co.* (*Fruit Brokers*) *Ltd.*,[9] and particularly the observations of Maugham L.J. My Lords, I do not doubt that the general proposition for which the respondents contend must be qualified by saying that a sale outside the market which has or may have the effect of depriving the market owner of toll or some other advantage is an actionable disturbance only if the person selling takes or seeks to take the benefit of the market. That is clearly a "fraud upon "the market." The market owner provides the facilities and attracts the concourse. Whoever takes advantage of that concourse cannot fairly avoid paying his proper dues. I know of no case in which (apart from rival market cases) this has not been an essential element either express or implied. It may take many forms: e.g., where a cattle dealer leaves his sheep outside the market but goes to the market to find customers whom he takes outside and there sells his sheep to them (see *Bridgland* v. *Shapter*[10]), or by selling by sample in the market in order to evade paying toll on the bulk (see *Bailiffs of Tewkesbury* v. *Bricknell*[11]), or by intercepting goods on the way to market (see *Turner* v. *Sterling*,[12] and, to cite a modern case, *Loughry* v. *Doherty*[13]). Always the underlying assumption is that, but for the act complained of, the producer would have paid toll or other dues in the market and that the intention of the act was to evade such payment.

It is impossible, in my opinion, to bring this law of the market into relation with the circumstances of the present case. It may well be that, if there had been no Pig Marketing Board, no war, no Defence Regulations, no Statutory Rules and Orders made under them, no Ministry of Agriculture, no new abattoir and other plant, the respondents' market in pigs alive or dead would have continued to flourish. It is possible to feel some regret that the market owners have suffered without compensation the loss of their market. But it is not the necessary consequence that the society or Ministry have been guilty of an actionable

[8] (1843) 12 M. & W. 18.
[9] [1936] Ch. 78.
[10] (1839) 5 M. & W. 375.
[11] (1809) 2 Taunt. 120.
[12] (1672) 2 Vent. 25.
[13] [1928] I.R. 103, 117.

disturbance. They would admit, for it is clear from the correspondence, that they did not fail to foresee that one of the results of the new régime would be that toll would not be payable upon the pigs delivered to the society's premises, but it would be extravagant to suggest that the object of the scheme was to evade toll or that at any stage of it the producers, the Ministry, or the society got the benefit of the market without paying the proper dues. It was to the Ministry alone that the producer could sell live pigs for slaughter. Why should he send them to a market where there was no concourse of buyers and, if there had been, not one of them could buy? And how did the Ministry disturb the market when they sold the pigs to the licensed curer of their choice? No satisfactory answer was or could be given to these questions. Nor was a better answer given in respect of the carcases that were sold direct to the society by the producers. The claim that such sales were a disturbance of the market is, as I have already pointed out, tantamount to saying that no trader within the market limits can at any time buy a marketable article except in the market—a proposition that cannot be supported.

I need say nothing about the conspiracy claim. It follows from what I have said that it must fail.

In my opinion, therefore, the appeal must be allowed with costs and the cross-appeal dismissed with costs. The respondents (the cross-appellants) must pay the costs of the appellants in the Court of Appeal and in this House, and the order of Curran J., including his order as to costs, so far as it affects the parties to this appeal, should be restored.

LORD REID. My Lords, I entirely agree with what has been said by my noble and learned friend Lord Simonds, and I only add a few observations because we are differing from the Court of Appeal in Northern Ireland. I need say nothing about the position before 1948: the changes then made by the appellants, the society and the Ministry, were the cause of the present action being raised against them. The trade in pig carcases in the respondents' market ceased as a result of those changes and the question is whether the actions of the appellants in that year were or were not legitimate.

The first contention of the respondents is that the respondents' actions amounted to levying a rival market at the society's premises. So it seems to me that the first thing to do is to see what happened at those premises. The Ministry, who were the sole buyers of live pigs for slaughter, set up a collecting centre there by agreement with the society, and large numbers of pigs were brought there. Some were brought by carriers engaged by the Ministry to collect them from farms, and some were brought or sent by the farmers. But no bargaining took place there. The price at which and the terms on which the Ministry bought had been published and were not subject to variation, and the

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position was similar with regard to pig carcases sold to the society and delivered there. The public were not invited to come there: the only members of the public invited to come were persons who had live pigs or carcases for sale and who chose to bring them there or persons who the sellers engaged to take their pigs or carcases there. Those pigs or carcases were generally if not always brought at pre-arranged times and there was no concourse of people there: if two or more persons bringing pigs happened to arrive at the same time I do not think that that could be described as a concourse of sellers. I am assuming that the property in the pigs and carcases had not passed until they were delivered, although I think that it had. Even if there could be a rival market without a concourse of buyers and sellers there must at least be activities in the "rival market" which bears some resemblance to the activities in an ordinary market and here I can see none. At best for the respondents all that happened was that a number of sellers arrived in succession and delivered their pigs or carcases, the property in which then passed to the Ministry or the society.

Then the respondents contended on more general grounds that the appellants' activities amounted to disturbance of their market. In a sense they did because it may well be that if the changes made in 1948 had never been made the trade in their market would have continued. But that is not what is meant by disturbance of a market as an actionable wrong. In general a person commits no tort if he buys goods which the seller might otherwise have sent to market. What he is not entitled to do is to take advantage of the concourse of the market. Typical examples are intercepting a seller on the way to the market and buying the goods before they reach the market, or going into the market to find a buyer who will come out and buy goods outside the market. It might be difficult in some cases to decide whether a person had taken advantage of the concourse but in this case it appears to me to be impossible to say that the appellants took any such advantage. Their operations could have been conducted in exactly the same way if there had never been a market.

Lord Tucker. My Lords, I agree that the appeal be allowed and the cross-appeal dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack.

Lord Keith of Avonholm. My Lords, I agree. I think the learned Lord Chief Justice would have reached the same result if he had not thought that the society's premises were a place of public resort in respect of what he regarded as the sale there of live pigs and pig carcases by the producers.

The transactions completed there he distinguished from the sales of pigs on the producers' farms which he held were private sales on private premises whereas the transactions on the

society's premises he held were not. He seems to regard the producers as public resorting to the society's premises and constituting a concourse of sellers, which in his view distinguishes the two cases. The matter cannot, I think, be so regarded. The society's premises are, in my view, as much private premises as is the shop of a shopkeeper and though, as *Goldsmid's* case [14] shows, a rival market may be set up in private premises, the coming of sellers to the society's premises with a commodity in which the Ministry or the society trades does not seem to me to be distinguishable from a stream of purchasers coming to a shop to buy the commodities in which the shopkeeper deals. In neither case is there a concourse of buyers and sellers. There is merely a succession of persons who come with a predetermined object to buy from, or sell to, a particular individual and depart when that object has been accomplished. I doubt if it is right to regard the buyers in the one case as a concourse of buyers and the sellers in the other as a concourse of sellers. So far as I have observed from the cases the phrase "a concourse of "buyers and sellers" seems to be used as a coming together of buyers and sellers, a concourse of both, not separate concourses of each. "Concourse," in any event, does not seem to me to be an apt word to apply to persons who are not gathered together in one place for a common purpose, but who come independently and at their own convenience to particular premises with the object of buying from, or selling to, the occupier of these premises. In my opinion the arrangements and transactions of the Ministry and the society present none of the essential features of a market. *Goldsmid's* case [15] was a clear case of a concourse of buyers and sellers but there is some indication, particularly in the judgment of Cotton L.J., that if the acts complained of had been solely the acts of the tenants of the railway company the decision might have been different. If the argument for rival market fails, a claim for any other kind of disturbance must, in this case, in my opinion, also fail.

LORD SOMERVELL OF HARROW. My Lords, Lord MacDermott held that in cases where the contract of sale was made on the farms no advantage was taken of the market and no tort was committed. This was the position, in his view, when pigs were collected by the advertised transport facilities.

Where pigs were delivered by the producers at the society's premises he held (1) that the contract was not completed until delivery at the society's premises, and (2) that the sales were therefore tortious in that the invitation to sellers to sell at the society's premises constituted a rival market.

I think that in those cases the contract may have been concluded at an earlier stage but in any case I am unable to regard the invitation to producers to bring their pigs to be purchased

[14] 9 App.Cas. 927; 25 Ch.D. 511. [15] Ibid.

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by the Minister at the society's premises as constituting those premises a rival market.

A market is a place to which sellers who have not found buyers take their goods in the hope of finding buyers and to which buyers resort in the hope of finding the goods they want. If a seller has found a buyer or buyers, or a buyer has found the goods he wants in the hands of one or more sellers there is no need for either side to resort to the market. The word "con-"course" is ambiguous. The suggestion that an invitation to sellers in a market area might be a tort would be very far-reaching. It is common for a trader to advertise the fact that he is a willing purchaser of old iron, fruit, or vegetables, etc. If as a result goods are sold to him direct which previously went through the market, no tort is, in my opinion, committed against the holder of the market.

This, I think, disposes of the claim so far as it relates to purchases by the Minister. The Minister having bought the pigs had only one buyer to whom he wished to sell, the society. I agree with Lord MacDermott that these sales were not torts as against the plaintiffs. The seller had found his buyer and had no need to take his goods to market.

There is a proviso to the above general principles in that a man may commit the tort of disturbing market rights if he takes advantage of the market in order to find a buyer, or goods which he wants to buy. A simple case is that of a buyer who waits for and buys an animal on its way to the market. In the present transactions it seems to me that no advantage was taken of the market. Everything would have happened as it did if there had been no market in Enniskillen and previous sales had been done direct between producers and curers.

For these reasons I would allow the appeal and dismiss the cross-appeal, and I agree with the order suggested by my noble and learned friend on the Woolsack.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Linklaters & Paines; Stephenson, Harwood & Tatham.*

J. A. G.

[COURT OF APPEAL.]

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Morris, Sellers and Willmer L.JJ.

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[1954 C. No. 3693.]

Dock—Regulations—Removal of safety gear—Construction and applicability of regulation 45*—Uncovered hatch—Docks Regulations,* 1934 (*S.R. & O.,* 1934, *No.* 279), *rr.* 37, 45.

The plaintiff's husband, a boatswain, fell to his death through an open hatchway of a vessel while she was loading a cargo of coal at a berth. Although the coamings of the hatch were about 5 feet in height there existed hatch covers which had been removed for the loading. The plaintiff claimed damages from the defendant shipowners alleging breach of regulation 45 of the Docks Regulations, 1934, in that the defendants had failed to replace the covers over the hatchway when the necessity for their removal had ended:—

Held, (1) the words "required by these regulations to be provided" in regulation 45 of the Docks Regulations, 1934,[1] are related to and govern the items of equipment mentioned in the early part of the sentence, while the words "other things whatsoever" refer to other things required by the regulations in addition to the items required by the regulations that are previously mentioned specifically.

(2) That, as "hatch covering" in regulation 45 referred only to such a covering as was required to be provided by the regulations, and as by virtue of the height of the coamings no coverings were required by regulation 37 for the hatch through which the deceased fell, there could be no breach of regulation 45 in failing to replace the hatch coverings.

Dicta of Lord du Parcq in *Grant* v. *Sun Shipping Co. Ltd.* [1948] A.C. 549, 561; [1948] 2 All E.R. 238 not followed.

APPEAL from McNair J.

On November 28, 1953, the defendants' self-trimming collier *Corfield*, a vessel of some 4,000 tons with four holds, two forward and two aft, was lying in a berth at the Commissioners Staithes, South Shields, loading a cargo of coal. The hatch coamings were approximately 5 feet high from the deck level. For the purpose of the loading three of the holds had been uncovered but No. 1 hold, the foremost one, had only been partly opened up, it not being intended to load coal into it that day. In these circumstances, George Robert Cockerill, a boatswain, fell to his death through the uncovered part of the hatchway. No one on the ship saw him fall but it was inferred that he had climbed up on to the forward section of the hatch covers

[1] Docks Regulations, 1934, reg. 45: "No person shall, unless duly "authorised or in the case of necessity, remove or interfere with any "fencing, gangway, gear, ladder, "hatch covering, life-saving means "or appliances, lights, marks, "stages or other things whatsoever "required by these regulations to be "provided. If removed, such things "shall be restored at the end of the "period during which their removal "was necessary, by the persons last "engaged in the work that necessitated such removal."

Reg. 37: "(*a*) If any hatch of a "hold accessible to any person employed and exceeding five feet in "depth, measured from the level of "the deck in which the hatch is "situated, to the bottom of the hold, "is not in use for the passage of "goods, coal or other material, or for "trimming, and the coamings are less "than two feet six inches in height, "such hatch shall either be fenced to "a height of three feet or be securely "covered. Provided that this requirement shall not apply (i) to vessels "not exceeding 200 tons net registered tonnage which have only one "hatchway, (ii) to any vessel during "meal times or other short interruptions of work during the period of "employment. (*b*) Hatch coverings "shall not be used in the construction "of deck or cargo stages, or for any "other purpose which may expose "them to damage. (*c*) Hatch coverings shall be replaced on the hatches "in the positions indicated by the "markings made thereon in pursuance "of regulation 14."

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of No. 1 hold for the purpose of preparing an insurance wire for use when the ship had later that day to move out to mooring buoys for the weekend, and while so doing had fallen into the hold.

The plaintiff, widow and administratrix of the deceased, claimed damages from the defendant shipowners, alleging negligence and breach of regulation 45 of the Docks Regulations, 1934.

McNair J. found for the defendants. He rejected both the allegations of common law negligence and of breach of statutory duty. He found it quite impossible to assign any clear meaning to regulation 45. The plaintiff now appealed, pleading only breach of regulation 45.

The case is reported only on the question of the construction of regulation 45.

F. W. Beney Q.C. and *J. L. Elson Rees* for the plaintiff.

Montague Berryman Q.C. and *W. G. Wingate* for the defendants.

In addition to the cases referred to in the judgments, the following cases were cited in argument: *Manchester Ship Canal Co.* v. *Director of Public Prosecutions*[2]; *Stuart* v. *Nixon*[3]; *Howlett* v. *Shaw, Savill and Albion Co. Ltd.*[4]; *Kininmonth* v. *France Fenwick & Co. Ltd.*[5]; *Coggins & Griffiths* v. *Peacock*[6]; *Groves* v. *Wimborne (Lord)*[7]; *Caswell* v. *Powell Dufferin Associated Collieries*[8]; *Smithwick* v. *National Coal Board*[9]; *Harrison* v. *National Coal Board.*[10]

Cur. adv. vult.

Morris L.J. stated the facts and continued: The breach of statutory duty alleged at the hearing and on the appeal relates to regulation 45 of the Docks Regulations, 1934 (Statutory Rules and Orders), No. 279. [His Lordship read the regulation and continued:] That regulation appears in Part V. The regulations provide that it is the duty of all persons whether owners, occupiers or persons employed to comply with Part V of the regulations.

On a consideration of regulation 45 the question arises whether the words "required by these regulations to be provided" govern all that had gone before, or whether they govern only the words "other things whatsoever." It is argued on behalf of the plaintiff that the latter is the correct construction. On that basis it is said that in the present case hatch coverings were removed, and it is said that in breach of the requirement in the second sentence

[2] [1930] 1 K.B. 547; 46 T.L.R. 163.
[3] [1901] A.C. 79.
[4] (1936) 19 Ll.L.Rep. 176.
[5] (1949) 65 T.L.R. 285.
[6] (1938) 46 Ll.L.Rep. 113.
[7] [1898] 2 Q.B. 402; 14 T.L.R. 493.
[8] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.
[9] [1950] 2 K.B. 335; 66 T.L.R. (Pt. 2) 173.
[10] [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

of the regulation the hatch covers were not restored. It is said, therefore, that the defendants were in breach of the regulation.

[His Lordship read regulation 37 in Part IV of the regulations and continued:] It is clear that the depth from the level of the deck in which No. 1 hatch was situated to the bottom of the hold was more than 5 feet. Where there is such a hold and when the hatch is not in use for the passage of goods, coal or other material or for trimming, and where the coamings are less than 2 feet 6 inches in height, the hatch must either be fenced to a height of 3 feet, or be separately covered. That requirement is subject to the proviso in the regulation. But on the steamship *Corfield* the coamings of No. 1 hatch were about 5 feet in height. It is clear, therefore, that there was no requirement under regulation 37 which made it necessary to have hatch coverings over the hatch. Nor is any other regulation to be found which made it obligatory to have hatch coverings. If, therefore, when considering regulation 45 the proper construction is that the words "required by "these regulations to be provided" extend to and include the words "hatch covering," then on this ship there were no hatch coverings which were required by the regulations to be provided. If that were so, then no breach of regulation 45 would be shown.

This question of construction was referred to in the House of Lords in *Grant* v. *Sun Shipping Co. Ltd.*[1] In his speech in that case Lord du Parcq said as follows[2]: "My Lords, I think that "there is no doubt that these regulations imposed on the second "defenders the duty of replacing the hatch covering and of "leaving in place the light which was necessary for the illumina-"tion of that part of the ship in which the pursuer was working. "The question was raised in argument whether the words "'required by these regulations to be provided' in regulation 45 "were to be read as qualifying only the words 'other things what-"'soever' or as qualifying all the preceding substantives. Little "perhaps turns on this, since there was plainly a breach of regu-"lation 37 on the part of the second defenders, but I have no "doubt that the former construction is correct. No other seems "to me to be possible with due regard to the context. One of "the preceding words is the general word 'gear' and it cannot "have been the intention of the Secretary of State to prohibit "the removal only of such gear as was required by the regulations "to be provided."

Lord Porter had begun his speech by saying that he had had the opportunity of reading the opinion to be delivered by Lord du Parcq, and agreed with him in thinking that the appeal should be allowed. Lord Uthwatt said that he had had the advantage of reading in advance the opinion of Lord du Parcq, and that he entirely agreed with his reasoning and his conclusions. In that case common law negligence was established both against shipowners and ship repairers. As Lord du Parcq was of the opinion

[1] [1948] A.C. 549; [1948] 3 All E.R. 238.

[2] [1948] A.C. 549, 561.

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that there was a breach of regulation 37, he stated, accordingly, that little turned on the question of the construction of regulation 45. Counsel agreed that the opinion of Lord du Parcq on the question of construction was merely expressed obiter.

McNair J. proceeded on an acceptance of the view expressed by Lord du Parcq. It was furthermore a view that appealed to him. In his judgment he said as follows: "Neither counsel "submitted to me, nor do I think it right, that that passage in "Lord du Parcq's judgment was anything other than an obiter "expression of opinion and was not essential to the argument in "support of the view which Lord du Parcq was favouring. At "the same time it is a view expressed by a master in this "particular field of the Factories Act and the Dock Regulations, "and I would be very loath not to follow it unless I was con-"vinced by argument that the view which Lord du Parcq "expressed must have been expressed per incuriam. Having "considered the regulation as a whole, it seems to me that the "view of construction which Lord du Parcq found to be quite "clear is one which I should follow, and, accordingly, that I "should take the view that hatch coverings in regulation 45 "means hatch coverings of any hatch whether the coamings are "less or more than 2 feet 6 inches in height."

Proceeding upon that basis, the judge then examined in detail the wording of regulation 45, and said that he found it quite impossible to assign any clear meaning to it, or to find in it any obligation which, on the facts of the case, would require that the hatch covers on No. 1 hatch should be replaced before the vessel shifted from her loading berth to the mooring buoys. It seems to me that in this case it does become essential to form a conclusion as to the construction of regulation 45. In considering the matter, although we are not bound by the view expressed by Lord du Parcq, it could only be after giving that view the most careful and respectful consideration that anyone would venture to differ from it. On the facts of this case it would, however, seem to be a strange result that if hatch coverings were not required by the regulations, yet because they existed there was a statutory requirement to restore them if they were removed. If they need never have been there at all, it would be surprising if, after their removal, a failure to restore them would involve committing an offence. If the regulation does apply, then on the facts of this case, so far as they are established, it is by no means clear upon whom the duty of restoring rested. The removal was necessary in preparation for the work of loading. The restoration has to be by "the persons last engaged in the work that necessitated such "removal." That would appear to denote in this case the persons engaged in the loading. The evidence does not clearly establish who they were. It was, however, contended that there was a duty on the owners to ensure that the restoration would take place, and that this duty was imposed upon the owners

irrespective of the question as to the identity of the persons required to do the actual work of restoration.

The question arises, therefore, as to the construction of the first sentence of regulation 45. The view that I have formed is that the words "required by these regulations to be provided" govern the things mentioned in the early part of the sentence. The words "other things whatsoever" refer, in my view, to other things required by the regulations in addition to the things required by the regulations that are previously mentioned. An examination of the regulations shows that the words used in the first sentence of regulation 45 describe certain of the things which by the regulations had to be provided. Thus "fencing" is referred to in regulations 1, 26, 28 and 37. "Gangway" is referred to in regulation 9. The word "gear" may cover very many things such as those denoted in regulations 13, 19, 27, 28 and 29. The word "ladder" may refer to regulations 9, 11 and 28. As to "hatch coverings," in addition to the requirement in regulation 37 reference may be made to regulations 14, 15, 16 and 38. "Life-saving means or appliances" are referred to in regulation 2. "Lights" can have reference to regulations 3 and 12. "Marks" can have reference to regulations 14 and 29. "Stages" can have reference to regulations 36 and 40.

In the light of a consideration of the regulations as a whole I am reinforced in the view that regulation 45 has reference to things which the regulations require to be provided. Lord du Parcq was of the opinion that it could not have been the intention of the Secretary of State to prohibit the removal only of such "gear" as was required by the regulations to be provided. But the word "gear" is a somewhat comprehensive one, and if there were in fact some wholly unnecessary "gear" it would be surprising if a failure to replace after removal should be an offence. So also there might be many examples of lights on a ship other than those "required to be provided." It would again, in my view, be strange if there was obligation to restore them after removal.

It was submitted by Mr. Beney that if the words "required "by these regulations to be provided" covered the words "hatch "coverings," there would be a conflict between regulations 37 and 45. He submitted that under regulation 37 hatch covers, when properly removed, need not be replaced during meal times or other short intervals of work during the period of employment, whereas under regulation 45 hatch covers, if removed, must be restored at the end of the period during which their removal was necessary. I am not impressed by this consideration, for it seems to me that the interval of meal times or other short interruptions of work would be within "the period" during which their removal was necessary.

After endeavouring to approach the question of construction with every caution, I have reached the conclusion that in regard to hatch coverings regulation 45 refers to such hatch coverings as

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are required by the regulations to be provided. In the present case, because of the height of the hatch coamings, there was no requirement to provide hatch coverings on No. 1 hatch. It follows, therefore, that there was no breach of regulation 45 and that the claim fails on this ground.

If I had been of the contrary opinion, and had thought that regulation 45 applied to hatch coverings whether required by the regulations or not, I would not have shared the judge's difficulties in applying the regulation, and I would have considered that effect could and should be given to it.

The view that I have formed makes it unnecessary to deal fully with certain other matters touched upon during the arguments. Mr. Berryman did not contend that the deceased was not one who could claim the benefit of the regulations at the relevant time, but he submitted that the process of loading had ceased when the ship left the berth, and that the regulations no longer applied. I do not find it necessary to deal fully with this submission, but I am not prepared to accept it.

For the reasons that I have given I consider that the claim fails, and I would, therefore, dismiss the appeal.

SELLERS L.J. I also would dismiss this appeal from the judgment of McNair J., but would decide against the claim on somewhat different grounds. [His Lordship reviewed the circumstances of the deceased's fall and continued:]

The steamship *Corfield* was a self-trimming collier of some 4,000 tons. She had in the forepart of the vessel a hold 30 feet by 30 feet with deck space on each side limited to 4 feet 6 inches between the coamings and the bulwarks. No doubt because of this construction the coamings were the unusual height of 5 feet.

Regulation 37 had no application to this hold, as it applies only where coamings are less than 2 feet 6 inches in height. This is of considerable significance in this case as coamings of 5 feet high might well justify the shipowner or the ship's officers regarding an open hatchway in such circumstances as constituting no danger. Any activity on the hatch coverings, complete or partial, would appear to have to be deliberate, and no accidental use of that area would ever be contemplated. In respect of such a well guarded hatch it would appear improbable that regulations would be necessary. But it was argued that regulation 45 applied and had been infringed. On the face of it I would regard regulation 45 as dealing with very different circumstances, namely, where safety precautions had been taken and circumstances required their removal. With due deference to the construction put by Lord du Parcq on this regulation in the course of his speech in *Grant* v. *Sun Shipping Co. Ltd.*,[3] I would, if free so to do, hold the contrary view.

[3] [1948] A.C. 561.

The regulation enjoins, as I would read it, that no person, unless duly authorised or in the case of necessity, shall remove or interfere with any of the things required by the regulations to be provided (most of which are enumerated) "or other things "whatsoever" required by the regulations if not expressly enumerated. That is, the words "required by these regulations "to be provided" qualify all the preceding requirements set out. This view is I think supported by regulation 46, which particularises "the fencing required by regulation 1," and then stipulates special restrictions with regard to those requirements.

It is conceded that Lord du Parcq's observations were not essential to the decision, but in addition to the authority of an opinion of Lord du Parcq further weight is given to his view, it is said, because the other noble Lords in terms expressed general agreement with the judgment without qualification. It is to be observed, however, that what the second defendants had removed in that case were hatch covers and lighting equipment which were in fact "required by these regulations to be provided," and therefore there was no reason in that case to give the words of regulation 45 the extended meaning which Lord du Parcq thought the correct meaning. The other noble Lords may, therefore, have considered that regulation 45 could properly be applied without accepting Lord du Parcq's construction.

I do not, therefore, feel that we are bound to follow the view there expressed, or that the reasoning of Lord du Parcq is sufficiently impelling to require us so to do. On the view I would take the hatch covers on that hold were not required to be provided here by the regulations, and therefore regulation 45 cannot be applied in this case. Even if it could, I doubt if the regulation required the shipowners to replace them.

The work that necessitated their removal—which removal might have been done by the ship as the vessel was approaching the Tyne or her berth at the staithes as was done in respect of holds 2 and 3—was the loading of coal. The shipowners, I understand, were not the persons engaged or to be engaged in the loading, and therefore were not the persons required by regulation 45 to restore the covers at the end of the period during which their removal was necessary.

I think this serves to show that the attempt to apply the regulation to this case is misconceived, although I would not support the view that, when properly invoked, the regulation is unintelligible. It has, I think, not infrequently been relied on, and its infringement proved, without any real difficulty.

No question has arisen in the case whether the deceased man through whom the plaintiff claims could claim the benefit of the regulations in any event as he was a member of the ship's crew and not a stevedore. It was submitted that the regulations would not apply in any case if the vessel had left her loading berth to proceed to moorings in the river. These are difficult points which in general both remain for consideration on some occasion,

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but if the construction I would put on regulation 45 is correct they do not arise, and in any case the evidence does not appear adequately to have been directed to them.

Willmer L.J. (read by Morris L.J.). This appeal relates solely to the contention put forward on behalf of the plaintiff that the defendants were in breach of their statutory duty in that they failed to comply with regulation 45 of the Docks Regulations, 1934.

[His Lordship read reg. 45 and continued:] It is not in dispute that about 10 a.m. on the day of the accident the two after sections of the hatch covers over No. 1 hold were removed, leaving only the forward section in place; nor that by 12.15 p.m., when the vessel started to move from her berth—by which time no cargo had been loaded into No. 1 hold—no attempt had been made to replace the hatch covers which had been removed. The fair inference, accepted by both sides, is that the deceased, prior to falling through the open part of the hatch, had climbed up on to the platform formed by the forward section of hatch covers, and that he did so for the purpose of preparing the insurance wire, which would have been required for use in mooring the vessel when she reached the buoys to which she was proceeding.

The contention for the plaintiff is that, by failing to restore the hatch covers which had been removed from No. 1 hatch, as soon as it was known that no cargo was to be loaded that day in that hold, the defendants or their servants were in breach of the obligation imposed upon them by the second sentence of regulation 45. That regulation, it is contended, by its terms applied to any hatch covering, so that the mere failure to restore the hatch covers which had been removed was sufficient to constitute a breach. On this view the words "required by these "regulations to be provided" are to be construed as qualifying only the words "other things whatsoever," and not any of the other items of equipment, such as hatch coverings, previously enumerated in the regulations.

On the other side, the defendants contend that the words "required by these regulations to be provided" must be read as qualifying not only the words "other things whatsoever," but also all the particular items of equipment previously enumerated. If so, it is said, there was no requirement in any of the regulations whereby this hatch was required to be covered.

[His Lordship read reg. 37 (*a*) and continued:] Since the coamings of No. 1 hatch in this vessel were 5 feet in height, there was no requirement under regulation 37 that it should be either fenced or covered. Accordingly, the defendants contend, regulation 45 had no application to the hatch covers of No. 1 hatch, since these did not amount to a "hatch covering required "by these regulations to be provided."

The judge preferred the plaintiff's construction of regulation

45, and held that the phrase "hatch covering" in that regulation meant the covering of any hatch, whether the coamings of that hatch were less or more than 2 feet 6 inches in height; that is, in his view it was not limited to a hatch covering "required by these regulations to be provided." It followed, therefore, that in the judge's view regulation 45 applied directly to the hatch covers of No. 1 hold in this case. He proceeded to point out, however, that the application of regulation 45, so construed, would lead to anomalous results, more particularly having regard to the obligations imposed by regulation 37 (*a*). In view of these anomalies, and in view of certain illogicalities which he detected in the provision of regulation 45 itself, he held that the language of the regulation did not convey, either to a lawyer or to a seafaring man, what its plain meaning is, and he refused to find that in the circumstances of this case there had been any breach of the regulation. He concluded by saying: "I find it quite impossible, after, I hope, a serious and "proper effort, to assign any clear meaning to regulation 45, to "find in it any obligation which on the facts of this case would "require that the hatch covers on this No. 1 hatch should be "replaced before the vessel shifted from her loading berth to "the mooring buoys."

Given the premises from which he started, I should for myself find it quite impossible to follow the judge to the conclusion at which he arrived. If regulation 45 applied to the hatch covering of No. 1 hatch, its meaning would in my judgment be plain enough. It would clearly require that the hatch covers removed should be restored at the end of the period during which their removal was necessary, and that moment would come, I apprehend, as soon as it was learnt that no cargo was to be loaded in that hold before the vessel shifted. If the regulation applies, the duty of the court is to apply it, and that duty is not to be shirked merely because, in the view of the court, the application of the regulation may lead to anomalous or illogical results. On the authority of the cases cited by the judge—to which may be added the recent decision of Lord Parker C.J. in *Mace* v. *Green & Silley Weir Ltd. and British India Steam Navigation Co. Ltd.*[4] —I think there can be no doubt that at the material time the process of loading was still going on within the meaning of the regulations. If, therefore, regulation 45 was applicable at all, it was applicable at the time of the accident, and on that basis I am satisfied that the facts proved would constitute a breach of it. I do not think, therefore, that the judge's decision can be supported upon the grounds which he stated.

The real question, to my mind, is whether regulation 45 ever applied at all to the facts of this case. That depends upon whether it is right to hold, as the judge held, that only the words "other things whatsoever" are qualified by the succeeding words

[4] [1959] 2 W.L.R. 504.

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"required by these regulations to be provided," so that the previously enumerated items of equipment—fencing, gangway, gear, and so forth—are left completely unqualified. In reaching his conclusion upon this point, the judge based himself largely upon the dictum of Lord du Parcq in *Grant* v. *Sun Shipping Co. Ltd.*[5] This has already been quoted, but I think it useful to set out once more the actual words used by Lord du Parcq, which were as follows: "The question was raised in argument whether the "words 'required by these regulations to be provided' in regula-"tion 45 were to be read as qualifying only the words 'other "'things whatsoever' or as qualifying all the preceding sub-"stantives. Little perhaps turns on this, since there was plainly "a breach of regulation 37 on the part of the second defenders, "but I have no doubt that the former construction is correct. "No other seems to me to be possible with due regard to the "context. One of the preceding words is the general word "'gear,' and it cannot have been the intention of the Secretary "of State to prohibit the removal only of such gear as was "required by the regulations to be provided."

The other Lords who concurred in Lord du Parcq's conclusion did not deal with this matter specifically, but at least it can be said that they did not express any dissent from the view expressed by Lord du Parcq. Clearly, however, Lord du Parcq's expression of view was not necessary to the decision of that case, for in that case the hatch covering in question was indubitably one to which the provisions of regulation 37 (*a*) applied. This court is, therefore, free to examine the question de novo, though it will naturally pay the greatest possible respect to an expression of view coming from so high an authority. Speaking for myself, it is only after the most anxious consideration that I have come to the conclusion that the construction put upon the regulation by Lord du Parcq was erroneous, and I do so only because, as it seems to me, that construction produces a nonsensical result, which cannot have been intended.

In order to appreciate this, I think it is desirable to look at the scheme of the regulations as a whole. They were made in pursuance of section 79 of the Factory and Workshop Act, 1901 —but are now deemed to have been made in pursuance of section 60 of the Act of 1937—and are expressed to have been made "in "respect of the processes of loading, unloading, moving and "handling goods in, on, or at any dock wharf, or quay, and the "processes of loading, unloading and coaling any ship in any "dock, harbour, or canal." Part I, which is to be complied with by the person having the control of a dock, provides for the installation of various safety devices in and about the dock, for example, fencing of the dock, provision of life-saving appliances and first-aid boxes. Part II, which is to be complied with by the owner, master or officer in charge of a ship, provides for such things as safe means of access to a ship in dock, and to

[5] [1948] A.C. 561.

its holds, for proper lighting, for the maintenance and marking of hatch coverings, and for the provision of suitable gear for lifting them. Part III, which is to be complied with by the owner of any machinery or plant used in the processes (which of course includes a shipowner so far as concerns any plant or machinery on board the ship), provides for the testing and examination of lifting gear, the marking of safe working loads, the fencing of working parts and of crane platforms, and such like matters. Part IV, which is to be complied with primarily by those carrying on the processes, that is, stevedores, but which in certain circumstances, in relation to regulation 37, must be complied with by the owner, master or officer in charge of the ship, provides in substance for safety precautions to be observed during the carrying on of the processes. Part V, of which regulation 45 is the first provision, is of universal application and must be complied with by all persons, whether owners, occupiers or persons employed. Regulations 45 and 46 deal with removal of, or interference with, certain specified appliances. Regulation 47 prescribes that the means of access provided shall be used; and regulation 48 prohibits all persons from going onto the hatch beams for the purpose of adjusting the gear for lifting them.

Bearing in mind the scheme of the regulations, one would expect that prima facie regulation 45, when it refers to removal of, or interference with, the various appliances or items of equipment, would refer to those previously prescribed in the preceding regulations. But for the contrary view expressed by Lord du Parcq I should, without hesitation, have said that that was the plain and ordinary meaning of the words used. I should have thought that the phrase "other things" in the first sentence was to be construed as ejusdem generis with the specifically enumerated items previously referred to, the genus being those things which are "required by these regulations to be provided." That this view is correct is, I should have thought, reinforced by the use of the words "such things" in the second sentence.

It is necessary, however, to examine the contrary view expressed by so high an authority as Lord du Parcq. It seems to me that, unless the words "required by these regulations to be "provided" are held to govern *all* the items of equipment previously enumerated, the regulations would have to be construed as of universal application, that is, as applying to *any* fencing, *any* gangway, *any* gear, *any* ladder, and so forth, without geographical limitation, and without regard to whether they had anything to do with carrying on the processes to which the regulations refer. Thus, to use the illustrations given in argument, the expression "ladder" would have to be construed as including any ladder, for example, a painter's ladder, that happened to be in use on the dock side. The expression "lights" would have to be construed as including any light, whether on shore or on board ship, regardless of whether it had any relation

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to the processes to which the regulations refer. A cabin light, for instance, would apparently be within the regulation—and, to push the matter to its logical conclusion, since this part of the regulations must be complied with by the owner, even the light in the owner's office in London would not escape. Such a result would, of course, be palpably absurd. But if the scope of the regulation is not to be limited by applying the words "required "by these regulations to be provided" to all the items previously enumerated, what other limitation, it may be asked, is to be imposed? Lord du Parcq singled out the word "gear," and expressed the view that it could not have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided. I venture to ask, why not? Unless so limited, the word "gear" is wide enough to include any gear of whatsoever nature, and wheresoever situated, regardless of whether it has any relation to the processes to which the regulations are directed. Again, what construction is to be put on the words "marks" and "stages," unless they are held to refer to the marks required by regulation 14, and to the stages prescribed by regulations 36 and 40?

The fact is that all the items of equipment enumerated in regulation 45 are items which form the subject of one or more of the preceding regulations. There would be every reason of good sense for enacting in regulation 45 that those items, the provision of which had been required by the preceding regulations, should not be removed or interfered with except when duly authorised, or in case of necessity. Thus, the reference to ladders becomes intelligible if it refers to ladders required by the preceding regulations, for example, regulations 9, 11 and 28. Similarly, the prohibition against removing or interfering with lights is good sense if the lights referred to are those prescribed by regulations 3 and 12. But unless regulation 45 is construed as limited in this way, it clearly goes far beyond anything required for the protection of persons engaged in the processes with which the regulations are intended to deal, and leads inexorably to utterly absurd results such as I have already mentioned, and such as were referred to by the judge in the course of his judgment.

Let me now examine the construction of regulation 45 contended for by the plaintiff in relation to the matter of hatch covering. By way of preface I may perhaps be permitted to remark that the primary purpose of hatch covers is to protect the cargo and prevent water from entering the ship. They are not designed in the first instance for the protection of personnel, whose safety is ordinarily cared for by the provision of proper hatch coamings. With regard to the particular hatch in question here, it is clear that there was no regulation which required the provision of any hatch covering at all while the vessel was in port. Nor was there any reason, from the point of view of safety of personnel, why there should have been any such regulation, since the particular hatch was in fact permanently "fenced" by

coamings 5 feet high. What then would be the object of a regulation prohibiting the removal of something that need never have been there at all? It cannot be said that there could be any reasonably foreseeable danger in leaving the covers off such a hatch, for if there were, the judge would clearly have been wrong to find that there was no negligence at common law in leaving the covers off this hatch—yet there has been no appeal with regard to this part of his judgment. If regulation 45 is limited in its application to hatch coverings required by the regulations to be provided, there is clearly good reason for it: for where the regulations have provided that, for reasons of safety, certain hatches should be either fenced or covered, it is obviously sensible to provide that such covering or fencing shall not be removed or interfered with. But on the construction contended for by the plaintiff, regulation 45 goes far beyond this, and prohibits the removal of, or interference with, any hatch covering, apparently without regard to whether any question of safety is involved. In other words, the argument involves that a regulation has been made which goes far beyond anything required for the safety of persons engaged on the processes. For myself, unless constrained by authority, I would decline to hold that a regulation made by the Secretary of State is to be construed in such a way. Since I am not constrained by any binding authority to hold otherwise, I prefer to construe regulation 45 in accordance with what I conceive to be the ordinary and natural meaning of the words used, and to hold that the words "required by these regulations "to be provided" are related to and qualify all the items of equipment previously enumerated.

If that view be right, it is conclusive of this case. The only hatch covering required by the regulations to be provided is that specified in regulation 37, which admittedly would have no application to the hatch in question in this case. It follows, therefore, that there could be no breach of regulation 45 in failing to replace the hatch covers on this hatch, seeing that such hatch covers were not required by the regulations to be provided. Accordingly, I arrive at the same conclusion as that reached by the judge, although for different reasons, namely, that no breach of statutory duty has been proved against the defendants.

Although it is unpleasant to have to say it of a man who is dead, I think there can be no doubt but that the sole cause of this unfortunate accident was the failure of the deceased man to exercise proper care for his own safety. There was abundant evidence from experienced seafaring witnesses on both sides that what the deceased man must be presumed to have been doing was a dangerous and a wrong thing to do. Although the judge in his judgment made no express finding against the deceased man, it is implicit in his reasoning that his view must have been that the deceased man was in fault. In view of the absence of any

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statutory duty on the part of the defendants, the point is of only academic interest.

For these reasons, I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *E. B. V. Christian & Co.; Botterell & Roche.*

A. W. G.

[COURT OF APPEAL.]

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[1958 F. 82.]

Town and Country Planning — Development — Planning permission — Condition—Relation of conditions to local planning considerations —Whether condition void for uncertainty—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 14 (1), 36.

By-law—Validity—Uncertainty—Condition of planning permission—Whether analogous to by-law—Town and Country Planning Act, 1947, *ss.* 14 (1), 36.

Statute—Construction—Uncertainty—Whether provision void—Provision incorporated in condition of planning permission—Whether condition valid—Housing Act, 1936, *s.* 115 (2).

Housing—"Agricultural population"—Meaning—Housing Act, 1936, *s.* 115 (2).

On December 5, 1952, the Buckingham County Council, acting under sections 14 and 36 [1] of the Town and Country Planning Act,

[1] Town and Country Planning Act, 1947, s. 14: "(1) Subject to the "provisions of this and the next "following section, where application "is made to the local planning "authority for permission to develop "land, that authority may grant per-"mission either unconditionally or "subject to such conditions as they "think fit, or may refuse permission; "and in dealing with any such "application the local planning "authority shall have regard to the "provisions of the development plan, "so far as material thereto, and to "any other material considerations. "(2) Without prejudice to the gener-"ality of the foregoing subsection, "conditions may be imposed on the "grant of permission to develop land "thereunder—(*a*) for regulating the "development or use of any land "under the control of the applicant "(whether or not it is land in respect "of which the application was made) "or requiring the carrying out of "works on any such land, so far as "appears to the local planning autho-"rity to be expedient for the pur-"poses of or in connection with the "development authorised by the per-"mission; . . ."

S. 36: "Where, under the fore-"going provisions of this Part of this "Act, a local planning authority are "required to have regard to the pro-"visions of the development plan in "relation to the exercise of any of "their functions, then, in relation "to the exercise of those functions "during any period before such a "plan has become operative with re-"spect to the area of that authority, "that authority shall have regard to "any directions which may be given "to them by the Minister as to the "provisions to be included in such "a plan, and subject to any such "directions shall have regard to the "provisions which in their opinion "will be required to be so included "for securing the proper planning of "the said area."

1947, granted to the plaintiffs' predecessor in title permission to develop an area at Chalfont St. Giles by building thereon a pair of semi-detached cottages subject to a condition that: "The "occupation of the houses shall be limited to persons whose "employment or latest employment is or was employment in agri-"culture as defined by section 119 (1) of the Town and Country "Planning Act, 1947, or in forestry, or in an industry mainly "dependent upon agriculture and including also the dependants "of such persons as aforesaid." The document added[2]: "The "reasons for imposing the said conditions are because the council "would not be prepared to permit the erection of dwelling-houses "on this site unconnected with the use of the adjoining land for "agriculture or similar purposes." The approval was registered as a local land charge. The property was within the metropolitan green belt, but there was no development plan yet in operation, although one was being prepared.

At first the cottages were occupied by persons whose employment was covered by the terms of the condition, but the plaintiffs, who acquired the freehold in 1956, wished to put in occupation persons whose employment was not so covered. They, therefore, sought a declaration that the condition was ultra vires the county council, or that it was void for uncertainty, or that the condition was no longer effective having been applicable only to the first occupants.

On appeal from Roxburgh J., who held that the condition was ultra vires and of no effect:—

Held, (1) that the powers conferred on local planning authorities to impose conditions on the grant of planning permission were wide enough to permit conditions prescribing the permitted class or classes of occupants, provided that a condition in that respect, as in others, was intelligibly and sensibly related to the planning scheme and proposals for the area in question.

Dicta of Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680 and Denning L.J. in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625 applied.

(2) That, applying that test, although in certain respects the condition was dissociated from the planning policy expressed in the outline development scheme as necessary for planning the area as an agricultural area, it could not be said that the condition could not implement the policy, nor was it invalidated by the disparity with the stated reasons for the condition (which required a topographical limitation not found in the condition itself).

(3) That the condition was not clearly expressed and there might be difficulty in deciding whether certain cases would or would not comply with it, but it was not void for uncertainty.

Decision of Roxburgh J. ([1958] 1 W.L.R. 1161; [1958] 3 All E.R. 521) reversed.

APPEAL from Roxburgh J.

In May 1952 one D. D. Clark, the plaintiffs' predecessor in title, applied for permission to build two cottages for farm

[2] Town and Country Planning (General Development) Order, 1950 (S.I. 1950, No. 728), art. 5 (9): "Every such notice [of the local "planning authority's decision] shall "be in writing and (*a*) in the case "of an application for planning per-"mission or approval, where the local "planning authority decide to grant "such permission or approval subject "to conditions or to refuse it, they "shall state their reasons in writing ". . ."

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workers and on July 22 permission was granted subject to the following condition, inter alia, that "the occupation of the houses "shall be limited to persons whose employment or latest employ-"ment is or was employment in agriculture as defined by section "119 (1) of the Town and Country Planning Act, 1947, or in "forestry, or in an industry mainly dependent upon agriculture "and including also the dependants of such persons as aforesaid." Owing to certain difficulties in siting the cottages, Clark's proposal and the permission given for it had to be abandoned, and a slightly different planning proposal was made by him on November 22, 1952. Permission to erect the farm workers' cottages according to his second proposal was granted, upon condition, on December 5, 1952, by the clerk to the Amersham Rural District Council for and on behalf of the Buckingham County Council, the local planning authority, acting under the Town and Country Planning Act, 1947, and the Town and Country (General Development) Order, 1950. The relevant condition was in identical language with that imposed on the earlier permit but in addition the later permit gave the reason for imposing the condition (pursuant to article 5 (9) of the Town and Country Planning (General Development) Order [2]) as follows: "Because the council would not be prepared to permit "the erection of dwelling-houses on this site unconnected with "the use of the adjoining land for agriculture or similar "purposes."

The approval was registered as a local land charge in the register of town planning prohibitions or restrictions and Clark had the two cottages erected. No question arose between him and the council as to the efficacy of the condition.

At the date when permission to erect the cottages was given no development plan had become operative with respect to the Chalfont St. Giles area but an outline development plan for Buckinghamshire had been drafted by the council in February 1950. The outline plan was a draft expressly enunciating "the "fundamental matters which must be considered in forming "the framework of the statutory plan." The Chalfont St. Giles area formed part of the Metropolitan Green Belt area, for which planning policy was stated to be as follows: "Although much "of the land included in the Metropolitan Green Belt Ring of "the Greater London plan is not necessarily of great scenic "beauty or highly productive from the agricultural point of view "it is essential that it should be preserved against building "development so as to form a barrier against the further outward "spread of London. . . . The communities in Bucks within the "Green Belt are . . . Chalfont St. Giles . . . It is proposed that "further development of these communities should be restricted "to infilling and rounding off of existing development."

The policy emerging from this statement was still current in December 1952, and, as no relevant directions had been given by the Minister, the council had, by section 36 of the Act, in

granting permission in the Chalfont St. Giles area to have regard to that outline plan, and by section 14 to "any other material "consideration."

After erection the cottages were first occupied by persons whose employment was covered by the terms of the condition, but on December 31, 1956, the Chalfont and District Permanent Building Society, Clark's mortgagees, conveyed the fee simple in the cottages to the plaintiffs, who were anxious to put in occupation persons whose employment was not within the terms of the condition. The plaintiffs claimed a declaration (1) that the condition was ultra vires the powers of the county council under the Act of 1947, or (2) that it was void for uncertainty, or that on the proper construction of the condition the force had been exhausted, so that the cottages might be occupied without regard to the nature of the employment of the occupants. They also sought rectification of the local land charges register.

Roxburgh J. held that the condition was ultra vires and of no effect and declared accordingly. The council appealed.

J. P. Widgery Q.C. and *Alan Fletcher* for the defendant council, as the local planning authority.

R. E. Megarry Q.C. and *C. F. Fletcher-Cooke Q.C.* for the landowners, the plaintiffs.

In addition to the cases referred to in the judgments, the following were cited in argument: *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[3]; *Point of Ayr Collieries Ltd.* v. *Lloyd-George*[4]; *Guildford Rural District Council* v. *Fortescue*[5]; *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[6]; *In re Gestetner Settlement*[7]; *In re Gape*[8]; *In re Ball*[9]; *Roberts* v. *Hopwood*[10]; *Sifton* v. *Sifton*[11]; *Scott* v. *Pillmar*[12]; *Repton School* v. *Repton Urban District Council*[13]; *Carltona Ltd.* v. *Works Commissioners.*[14]

Cur. adv. vult.

April 27. LORD EVERSHED M.R. stated the facts and continued: As is well known, the effect of the Town and Country Planning Act, 1947, was to place all land in England under planning control so that (so far as is relevant to this case) no vacant land could be "developed" by being built upon save with the permission of the local planning authority (in this case the defendant council), which permission might be granted either

[3] [1959] 2 W.L.R. 630; [1959] 2 All E.R. 102.

[4] [1943] 2 All E.R. 546.

[5] [1959] 2 W.L.R. 643; [1959] 1 All E.R. 111.

[6] [1957] A.C. 223; [1956] 2 W.L.R. 312; [1956] 2 All E.R. 669.

[7] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.

[8] [1952] Ch. 743; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579.

[9] [1947] Ch. 228; 63 T.L.R. 94; [1947] 1 All E.R. 458.

[10] [1925] A.C. 578.

[11] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[12] [1904] 2 K.B. 855.

[13] [1918] 2 K.B. 133.

[14] [1943] 2 All E.R. 560.

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unconditionally or subject to conditions. Thus it is that section 14 (1) of the Act provided, so far as material: "... where "application is made to the local planning authority for permis- "sion to develop land, that authority may grant permission "either unconditionally or subject to such conditions as they "think fit, or may refuse permission; and in dealing with any "such application the local planning authority shall have regard "to the provisions of the development plan, so far as material "thereto, and to any other material considerations."

There was in this case at the relevant date no operative "development plan" for the area in question. It follows, therefore, that the obligation of the council under the section was to have regard "to any other material consideration," and it is not in doubt that the effect in the present case of these five words which I have quoted was to introduce and make obligatory for the councils' consideration (there having been no direction by the Minister) the matters indicated by the final words of section 36 of the Act, namely, "the provisions which "in their opinion will be required to be so included" (that is, included in the development plan when operative) "for securing "the proper planning of the said area."

[His Lordship referred to the outline development plan, and continued:] There is no dispute that the area of Chalfont St. Giles, which includes the land in question, was and is intended to form part of what is generally known as London's Green Belt, and, as such, dedicated to rural use and excluded accordingly from any form of urban development. The "reason" given in the planning document of December 5, 1952, is conceded to reflect by its language that purpose: and it is also conceded, as I have already indicated, and as I later repeat, that by the joint effect of sections 14 and 36 of the Act it was the council's duty in considering Mr. Clark's application for planning permission to have regard to the provision which would in their opinion be required for achieving that purpose.

I take, first, Mr. Megarry's more broad and general attack on the validity of the condition, viz., that in spite of the generality of the language of section 14 (1) of the Act, "... such condi- "tions as they think fit," it is not open to the local planning authority to impose a condition in reference to a proposed structure related not to the manner in which the building may be used (e.g., as a residence, or as a shop, etc.), but to the class of persons who may use or occupy it. Upon this point I am content to adopt the conclusion and reasoning of Roxburgh J., who stated that acceptance of such an argument would involve reading some gloss or qualification into the language chosen by Parliament and that he could find no sufficient justification for doing so. The judge observed (and I respectfully agree with him) that the examples given in subsection (2) of the section are expressed to be without prejudice to the generality of the preceding subsection, and cannot, therefore, properly be invoked

for the very purpose of limiting that generality. I add that, in my judgment, the fact that the terms of section 12 of the Act in general provide that a material change in the user of premises will constitute development lends support to the interpretation of the general language of section 14 (1) according to its natural sense.

Though I am taking the point out of its order, I can also deal here, and briefly, with Mr. Megarry's last submission, viz., that on its true construction the condition only purported to apply by way of restriction to the first occupation of the cottages, so that its force must now be taken as spent. Mr. Megarry did not develop the argument at any length and he will, therefore, I hope, forgive me if I reject it somewhat summarily. It is sufficient, in my view, to say that I do not think the language of the condition can fairly be so construed and that no planning authority could sensibly in a case of this kind be supposed to be discharging its statutory duty by imposing a condition so restricted.

To my mind the most difficult question is whether, when regard is had, on the one hand, to the planning scheme and proposals of the council, which may be deduced from the outline development plan, and the reasons given by the council for the imposition of the condition in December 1952; and, on the other hand, to the scope and effect of the condition itself according to a fair interpretation of the language, the latter ought to be treated as having been beyond the council's powers, not being fairly and reasonably related to the former. In formulating the question, I have, as a matter of language, substituted (by reference) the words "the planning scheme and proposals of "the council" for the words used by Roxburgh J., "the local "planning considerations."[1] Both forms of words depart somewhat from the language of Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*,[2] where he spoke of the requirement that the conditions should "fairly "and reasonably relate to the permitted development." The test proper to be applied, however it be expressed, is derived from the last four lines of section 14 (1) of the Act as they are qualified in the present case by the terms of section 36 of the Act. The joint effect of these provisions being (so far as relevant to the present case) that in dealing with Mr. Clark's application to build the two "farm workers' cottages" the council were bound to have regard to the provisions which, in their opinion, would be required to be included in the then contemplated development plan in respect of this area for securing its proper planning. It seemed at one time that there might be a question raised whether it was the duty of the council to assume the burden of proving positively what were the matters to which in fact they had had regard. But Mr. Megarry has in this respect

[1] [1958] 1 W.L.R. 1161, 1166; [1958] 3 All E.R. 521.

[2] [1958] 1 Q.B. 554, 572; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

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eased our burden, for he has conceded that (prima facie, at any rate) it is not necessary that the council should prove these matters affirmatively. He concedes that they should be assumed to have had regard to the proper factors unless the objector to the condition can produce evidence to the contrary (as has not been done in this case) or unless the facts of the case, and particularly the terms of the condition itself, lead as a matter of necessary or proper inference to a contrary result.

So far there is no conflict (in principle at any rate) between Mr. Megarry and Mr. Widgery. But what is said by Mr. Megarry (and what was, I think, found by the judge) was to this effect: that since the contemplated development plan for the relevant area involved its use and preservation as a rural (that is, an agricultural) area, then the provisions which would have to be included in such a plan and to which, therefore, the council must have regard, must be provisions designed to achieve that end; and that the terms of the condition, fairly construed, were in truth inconsistent with such provisions or requirements. Without, therefore, contending (as I understood him) that the court ought necessarily here to infer failure on the part of the council to have regard to the proper requirements of the intended plan, Mr. Megarry submitted, in reliance upon Lord Denning's language, that the terms of the condition bore no fair or reasonable relation to the intended plan, and, therefore, that the condition must be treated, according to Lord Denning, as "invalid." Put another way, Mr. Megarry said that if it be shown that the terms of the condition bear no fair or reasonable relation to the intended plan, then, whatever the council did or intended to do or even thought they did, they have or must be taken to have lost sight in framing their condition of the matters which were relevant for their consideration; and the result is, therefore, the same as if they had not properly ever considered such matters at all.

On the other side, Mr. Widgery, while not seeking to qualify the true effect of Lord Denning's language, invoked also the terms of Lord Greene M.R.'s judgment in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[3] as showing that in such circumstances as the present if the local authority has not misdirected itself by paying regard to the wrong matters, then the matter of reasonableness is, prima facie, at any rate, one for the local authority's discretion; and that, in regard to such discretion, the court will not act in an appellate capacity, substituting its own opinion for that of the local authority.

Since it is at this point that the arguments of Mr. Megarry and Mr. Widgery part company, I hope I shall be forgiven for substantial citations from Lord Greene M.R. He said in the *Wednesbury* case[4]: "What, then, is the power of the courts?

[3] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

[4] [1948] 1 K.B. 223, 228.

"They can only interfere with an act of executive authority if "it be shown that the authority has contravened the law. It is "for those who assert that the local authority has contravened "the law to establish that proposition. On the face of it, a "condition of the kind imposed in this case is perfectly lawful. "It is not to be assumed prima facie that responsible bodies like "the local authority in this case will exceed their powers; but "the court, whenever it is alleged that the local authority have "contravened the law, must not substitute itself for that "authority. It is only concerned with seeing whether or not "the proposition is made good. When an executive discretion is "entrusted by Parliament to a body such as the local authority "in this case, what appears to be an exercise of that discretion "can only be challenged in the courts in a strictly limited class "of case. As I have said, it must always be remembered that "the court is not a court of appeal. When discretion of this "kind is granted the law recognises certain principles upon "which that discretion must be exercised, but within the four "corners of those principles the discretion, in my opinion, is an "absolute one and cannot be questioned in any court of law. "What then are those principles? They are well understood. "They are principles which the court looks to in considering "any question of discretion of this kind. The exercise of such a "discretion must be a real exercise of the discretion. If, in the "statute conferring the discretion, there is to be found expressly "or by implication matters which the authority exercising the "discretion ought to have regard to, then in exercising the "discretion it must have regard to those matters. Conversely, "if the nature of the subject-matter and the general interpreta-"tion of the Act make it clear that certain matters would not "be germane to the matter in question, the authority must "disregard those irrelevant collateral matters. There have been "in the cases expressions used relating to the sort of things "that authorities must not do, not merely in cases under the "Cinematograph Act but, generally speaking, under other cases "where the powers of local authorities came to be considered. "I am not sure myself whether the permissible grounds of attack "cannot be defined under a single head. It has been perhaps a "little bit confusing to find a series of grounds set out. Bad "faith, dishonesty—those, of course, stand by themselves—"unreasonableness, attention given to extraneous circumstances, "disregard of public policy and things like that have all been "referred to, according to the facts of individual cases, as being "matters which are relevant to the question. If they cannot "all be confined under one head, they at any rate, I think, "overlap to a very great extent." Again, in reference to the judgment of Atkin J. in *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill*,[5] Lord Greene M.R. said[6]: "I think that Atkin J.

[5] [1915] 2 K.B. 49; 31 T.L.R. 138.

[6] [1948] 1 K.B. 223, 233.

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"was right in considering that the restrictions on the power of "imposing conditions were nothing like so broad as the majority "thought, but I am not sure that his language may not perhaps "be read in rather a different sense from that which I think he "must have intended. I do not find in the language that he "used any justification for thinking that it is for the court to "decide on the question of reasonableness rather than the local "authority. I do not read him as in any way dissenting from "the view which I have ventured to express, that the task of "the court is not to decide what it thinks is reasonable, but to "decide whether what is prima facie within the power of the "local authority is a condition which no reasonable authority, "acting within the four corners of their jurisdiction, could have "decided to impose."

In my judgment it follows from the citations I have made that if the condition in the present case is to be held "invalid" (that is, beyond the competence of the council to impose) it must be shown that its terms, upon the face of them, are demonstrably unrelated to the proposed plan. So that the result is the same as if the council had never had the proposed plan and its requirements really or properly in its mind at all. In other words, it is not, in my judgment, enough that the terms are not such as, in the opinion of the court, are best designed to subserve or promote the intended plan; or that, while capable of subserving or promoting the plan, they do so inefficiently and are or may be also capable, in practice, of creating anomalous situations and permitting occupation of the cottages by persons who have no concern with the intended agricultural use of the adjoining property.

The main criticism of the condition has been in two directions: first, that there is no limitation (as regards either the permitted occupants or as to the agricultural or industrial enterprises covered by the terms of the condition) to the adjoining district; and, secondly, that the phrase "any industry mainly "dependent on agriculture" covers a type of enterprise not only vague and extremely wide in its scope, but also unrelated to the (supposed) rural requirements of the neighbourhood.

These objections are formidable. But after much consideration and, indeed, some vacillation of opinion, I have come to the conclusion that in the light of Lord Greene M.R.'s exposition they are not sufficient to "invalidate" the condition. It is to be remembered (1) that the subject-matter to which the condition relates is two small "farm workers' cottages" in a rural area, and (2) that the condition is intended to persist for an indefinite period of time. In these circumstances it seems to me as a practical matter that in the foreseeable future and, at any rate, in at least nine cases out of ten, the effect of the condition is to limit the use of the cottages to the occupancy of persons who have a direct interest as workers in the agricultural requirements of the area; and that, although the language

of the condition would allow to qualify for occupation other persons who would have no such concern, for example (to cite extreme instances used in the course of the argument), an ex-employee of a sheep farm in New South Wales, or the servant of a canning factory in a neighbouring county, the result is only to show that the council have not limited the class of occupancy in the most strict or efficient way or in the way they might have done had they had the advantage before drafting the condition of hearing the arguments in this court. In other words, I have in the end come to the conclusion both (a) that the terms of the condition do not suffice to show that the council failed, or must be deemed to have failed, to have regard to the matters which, by the terms of the statute, they should have regarded, and (affirmatively) (b) that the terms of the condition are fairly and also reasonably (in the sense of intelligibly and sensibly, if not most economically and efficiently) related to the council's planning scheme and proposals.

It will be seen that I have used, throughout, the phrase "planning scheme and proposals" as being, in my view, most appropriate to the circumstances; but I do not intend any difference from Roxburgh J.'s phrase "local planning considera-"tions," and I also agree with Roxburgh J. in thinking that Lord Denning had no different intent by his words "the per-"mitted development" which could in strict use of language mean, in the present case, only the two cottages themselves. But Lord Denning was not intending to lay down a precise and governing formula for all cases of this kind, nor had he in mind or under consideration the problem which is raised in this case. I also disclaim, for my part, an intention to lay down some precise and governing formula; but I have ventured, in the light of Lord Greene M.R.'s judgment in the *Wednesbury* case,[7] to interpret Lord Denning's words "fairly and reasonably relate" as meaning "intelligibly and sensibly," and not as indicating that the court must approve the condition as being a "fair and "reasonable" exercise of the planning authority's discretion, judging, that is, of the fairness and reasonableness and so inevitably to some degree at least acting in an appellate capacity in regard to the authority's discretion.

It was the view of Roxburgh J. that since by the terms of the condition no preference was given to local agricultural workers over, say, employees of more distant canning factories, therefore the condition failed "fairly and reasonably" to relate to the proposed local plan; in other words, that the condition, to attain the required standard, should have provided that the class of permitted occupants other than purely local farm workers should only be entitled to live in the cottages if there were no strictly local applicants. Again, it was the view of the judge that the inclusion of industries mainly dependent on agriculture

[7] [1948] 1 K.B. 223.

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could not (possibly) be relevant to the intended local plan; and in considering the implication of the word "fair" he was of opinion that the local authority must be "fair" to all classes of the community which they represent.

These matters are beyond question weighty criticisms of the efficiency of the condition in its relation to the proposed plan, though, as regards the last point, I feel some doubt of the way in which the condition may be said to have failed (relevantly) in fairness to the general community. But for reasons which I have already tried to state, I have in the end come to the conclusion that these criticisms, being qualitative in character, do not suffice to disable the condition altogether, though I share my brethren's hope that its future use will be at the least carefully considered. Thus, if it is legitimate, for example, to consider whether the condition should have given priority to purely local farm workers, there seems to me to be logically no stopping short of reviewing the local authority's discretion in all its aspects, and rejecting the condition altogether if, in the end, it fell short of what the court would itself acting fairly and reasonably in relation to the plan have contrived.

There remains Mr. Megarry's attack on the condition on the ground that its language is void for uncertainty. What, asked Mr. Megarry, is the significance and effect of the word "occupation"? Is it intended to refer to occupation as of some right, that is, as tenant or licensee? Or does it extend to any person who for any reason and at any time happens to reside in the houses? Again, who are intended to be covered by the term "dependants"? Is financial dependence intended? And, if so, must such persons be in fact financially dependent and how at any given moment of time can such facts be ascertained? More difficult still, what is the scope and effect of the phrase "industry mainly dependent on agriculture," and is it relevant in what capacity the "occupier" is employed by such an industry? Finally, Mr. Megarry observed that, prima facie, the condition might be broken as a result of some fact (e.g., change in the nature of the employment) occurring after the "occupation" had been first entered into. It is undeniable that these criticisms have much force. But on the whole I conclude that on this point also (upon which it was, in the circumstances, unnecessary for the judge to reach a decision) the plaintiffs should not succeed. It is not difficult in the case of any general formula to suggest or imagine instances in which a difficulty might arise in saying whether the instance would or would not be within the formula; but it does not follow as a consequence that the formula should in vacuo, as it were, and in advance be held void. It has to be remembered that the present condition is related to two small farm workers' cottages. In that context I cannot think that any real difficulty arises, or would be likely to arise, in saying whether any "occupation" was within the condition or (as indeed Roxburgh J. thought) in saying what was

meant by "dependants." It is no doubt true that a subsequent change of employment might take an "occupancy" outside the permission allowed by the condition, though within it at the occupancy's commencement. But these considerations are pertinent, as I think, rather to the argument on ultra vires than to that on construction. The expression "industry mainly "dependent on agriculture" is indeed very vague and wide. But the real question is whether, if any question arose in the future, was a proposed occupant or was he not employed in such an industry, the parties or the court would be unable to give a certain answer. I am not persuaded that they could not. The judge took the view that the inclusion of this phrase would presently or in the future involve an "extensive and expensive "inquiry" to find out what industries were comprehended. But with all respect to him, I do not think this is so. In no circumstances and at no time would it, so far as I can see, be necessary to discover and make, as it were, a list of all the industries included by the phrase.

It was contended that since this condition was promulgated by a local authority in exercise of its statutory power, it was fairly analogous to a by-law, more particularly since penal consequences might ensue from its breach. It is true that the courts have on more than one occasion expressed the view that by-laws should be clear and certain in effect (see Halsbury's Laws of England, 3rd ed., vol. xxiv, para. 951, and cases there cited), though there is also authority for the view that the courts will not be astute to hold by-laws void and of no effect on the ground of obscurity. (See *Kruse* v. *Johnson*,[8] *per* Lord Russell C.J.) But, in my judgment, the analogy between the present condition and a by-law is not a true one. A by-law is a local but within the locality a general regulation; this condition was an expression of the terms on which the Bucks County Council informed Mr. Clark that they were prepared to grant to him permission to build his cottages, and the terms were at least satisfactory to him, for he built the cottages and no difficulty arose during his ownership in giving effect to the condition. But further, though penal consequences may follow upon a breach of the condition, they do so, as it were, at a remove. The first step which the local authority must take if they allege a breach of the condition is to serve an enforcement notice; and that notice may be challenged by the landowner or the tenant (as the case may be) before the local justices. It is only after the service of the notice and (if it has been challenged) the failure of the challenge that the local authority may invoke the penal provisions of the Act. These provisions seem to me to provide reasonable protection, at any rate, to the landowner in a case in which, because of difficulty or obscurity in the language of the condition, there is doubt whether the acts complained of constitute a breach.

[8] [1898] 2 Q.B. 91, 99; 14 T.L.R. 416.

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But there is another consideration which has appreciably affected my mind upon this matter. The language of the condition has been taken, so far as relevant, ipsis verbis, from the definition of the phrase "agricultural population" in section 34 (2) of the Housing Act, 1930, now section 115 (2) of the Housing Act, 1936.[9] It is no doubt true that we are asked to construe a condition in the permit issued by the Bucks County Council in December 1952 and not a section of the Housing Act. It may also be true that a collection of words can be reasonably clear in one context and obscure to the point of voidness in another; and it may further be that the administrative difficulties capable of arising from the formula in the Housing Acts (which are, so far as relevant, concerned with the grant of an annual subsidy in respect of premises occupied by a member of the "agricultual population," as above defined) are less than those which may emerge from a user of the formula in a condition imposed under the Town and Country Planning Act. Nevertheless, it seems to be inescapable that, if Mr. Megarry's arguments that the language in the condition to which I have referred is void for uncertainty in the context of the condition, it is no less void for uncertainty in the context of the Housing Acts. I do not, of course, say that forms of words occurring in an Act of Parliament are, because they so occur, sacrosanct against being held void for obscurity and uncertainty; but the court will, in my opinion, be slow to come to such a conclusion on words which have been on the statute book for more than a quarter of a century and have, during that time, doubtless been many times acted upon.

For the reasons which I have tried to state, I come therefore to the conclusion that we ought not to hold the condition in the present case void for uncertainty.

It follows, in my opinion, that all the challenges made upon the efficacy and validity of the condition should be rejected and that the appeal should be allowed accordingly.

Romer L.J. The ground upon which the judge based his declaration that the condition subject to which the defendants gave their approval under the Town and Country Planning Act, 1947, for the erection of the two cottages with which these proceedings are concerned was ultra vires and of no effect was, in substance, that the condition did not effectuate any proper planning purpose. The validity of the condition was impeached in the court below, as it was before us, on other grounds as well, but I will consider first the one which I have already mentioned.

[9] Housing Act, 1936, s. 115: "(2) . . . For the purposes of this "subsection, the expression 'agricul-"'tural population' means persons "whose employment or latest employ-"ment is or was employment in "agriculture or in an industry mainly "dependent upon agriculture, and "includes also the dependants of such "persons as aforesaid; the expression "'agriculture' includes dairy-farm-"ing and poultry-farming and the "use of land as grazing, meadow, "or pasture land, or orchard or osier "land, or woodland, or for market "gardens or nursery grounds; . . ."

At the date when the defendants gave their permission for the building of the cottages, namely, December 5, 1952, no development plan had become operative with respect to the Chalfont St. Giles area of the defendant council. An outline development plan for Buckinghamshire had, however, been drafted in February 1950. [His Lordship referred to the outline plan as set out above and continued:] The policy which emerges from this statement was still current in December 1952 and, as no relevant directions had been given by the Minister, the defendants had, in granting development permission in the Chalfont St. Giles area, to have regard to the outline development plan (section 36 of the Act) and to "any other material considera-"tions" (section 14). There can be no doubt but that the policy stated in the outline plan as set out above constituted a proper planning purpose or that conditions calculated to further that purpose could properly be attached to permission to develop in the area in question. Before considering the effect of the condition which the defendants did in fact attach, and which has resulted in this litigation, it is necessary to note the reason which the defendants gave for imposing it: "Because the council would "not be prepared to permit the erection of dwelling-houses on "this site unconnected with the use of the adjoining land for "agriculture or similar purposes." The meaning of this reason would appear to be that the council would only allow houses to be built on the site provided that their use, when erected, would be connected with the agricultural use of the adjoining land. The reason, so interpreted, is in conformity with the policy stated in the outline development plan and would seem to show that the defendants, in framing it, were aware of the obligation imposed upon them by section 36 of the Act. The plaintiffs contend, however, that the same cannot be said of the condition itself which, in their submission, did not implement either the planning policy as adumbrated in the outline development plan, or any other proper planning policy, and was in any event at variance with the reason given for imposing it. I will not repeat the terms of the condition for they have already been stated in the judgment of Lord Evershed M.R. They are clearly open to criticism in more than one important respect. But a preliminary question which, as it seems to me, has to be considered is whether a condition which is attached to a permission to build enjoys the same degree of protection from review by the courts as is enjoyed by planning policies. That protection or immunity has been recognised in several decisions and the principle underlying it has never, perhaps, been more clearly stated than in the *Wednesbury* case,[10] which has been fully discussed and analysed by Lord Evershed M.R. The effect of that and other decisions is that if there were any doubt as to the validity of

[10] [1948] 1 K.B. 223.

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the policy which I have extracted from the outline development plan (which in my judgment there is not) the courts would only intervene if satisfied that the defendants must have taken irrelevant matters into consideration or failed to pay regard to matters which were relevant. Now, conditions attached to development permission do not strictly constitute planning policy; they are rather means of effectuating a policy already pre-determined. I think nevertheless that they are entitled, equally with the policy which they are designed to implement, to the shelter of what I might call the *Wednesbury* [10] umbrella. The reasons for giving that shelter to decisions on policy are, in my opinion, equally applicable to the machinery which is essential for rendering those decisions effectual. Accordingly, conditions such as that now in question will not be invalidated on grounds of ultra vires, in my judgment, except on the contingencies indicated in the *Wednesbury* [10] line of authority.

The plaintiffs' principal contention, in brief, is that the terms of the condition, whether taken by themselves or in conjunction with their probable or reasonably possible consequences, show that the defendants must have paid regard to irrelevant considerations or failed to take relevant elements into account. They rely on the discrepancy between the condition and the planning policy as outlined in the outline development plan and also on the disparity between the condition itself and the reason which the defendants gave for its imposition.

Taking these two objections in order, the plaintiffs' first attack is based upon the scope of the condition which, says Mr. Megarry on their behalf, is unrelated to the outline policy, or to any other sensible planning policy. Subject to his other submission on ultra vires, Mr. Megarry concedes that parts of the condition, if isolated from the rest, would constitute a perfectly proper condition to be attached by the defendants when permitting the erection of the cottages. Thus if the condition had been that "the occupation of the houses shall be limited to persons whose "employment is employment in agriculture as defined by section "119 (1)" of the Act of 1947 Mr. Megarry admits that the objection now under consideration could not be advanced. The condition is, however, not so limited and the plaintiffs submit that the excess is destructive of the whole. A small excess, they say, if trifling enough to attract the maxim "de minimis," would be innocuous but the condition as framed lets in so many people as authorised occupants of the cottages who might have no connection with agriculture at all as to show that the defendants demonstrably lost sight of their obligations as the planning authority when they drafted it. In this connection the plaintiffs rely in part on the phrases "or was employment in agriculture" and "including also the dependants of such persons as aforesaid," but their main attack is upon the reference to "an industry

[10] [1948] 1 K.B. 223.

"mainly dependent upon agriculture." Apart from the uncertainty as to what this expression means the plaintiffs suggest that the owners of the cottages could let them to industrial workers whose job was some miles away in preference to local agricultural labourers who needed a home which was close to their work. Many other illustrations were also given in argument showing that a large category of persons could qualify as tenants whose occupation of the cottages would bear no relation to any sensible planning policy and certainly not to the policy outlined in the outline development plan. Mr. Widgery, for the defendants, frankly admitted that curious and anomalous positions might arise under the terms of the condition and that certain persons whose connection with agriculture was non-existent or remote might qualify as tenants whilst other persons, who might ordinarily be expected to qualify, would find themselves excluded. But he contended that the condition makes a broad division between persons whose employment is such that they may have to live in a rural area and persons whose employment is such that they need not, i.e., a distinction is in effect drawn between the agricultural population and others; that the effect of the condition is to exclude such persons as industrial or office workers who might otherwise have come into the area; that it therefore makes a sensible contribution to the retention of the rural character of that part of the county; and that it accordingly is in substantial and reasonable conformity with the policy contained in the outline development plan, and none the less because of the admitted possible anomalies. The condition, said Mr. Widgery, is right in principle and imperfection of detail affords no sufficient ground for invalidating it or indeed, on the authorities, for its review by the court at all. I think on the whole, that Mr. Widgery's contention should be accepted. Although the condition is most unfortunately worded and absurd results could follow having regard to its terms it does seem to me that broadly speaking it is in line with the outline development plan. It is not possible to say that the condition *could* not implement the policy outlined in that document; on the contrary it seems to me that it almost certainly will implement it, notwithstanding that it is dissociated from the policy in certain of its aspects. Assuming, as I do, that the condition is entitled to the same limited immunity from criticism and review as the defendants' planning policy itself, the plaintiffs have not satisfied me that the defendants must, in imposing it, have regarded the irrelevant or disregarded the relevant and thus laid themselves open to challenge. The plaintiffs further contend, as already mentioned, that the condition in no way reflects the reason which the defendants gave for imposing it. The point and force of the criticism is that by the "reason" the defendants evinced an intention that the use of the cottages should be connected with the stated use of the adjoining land whereas the condition itself imposes no topographical limitation on the class or work of

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permitted occupiers. That this disparity between the condition and the reason exists cannot be denied. On the footing, however, which I accept, that the condition is broadly in line with the defendants' general planning policy it cannot, in my judgment, be invalidated because of some inconsistency with a reason which, as I have earlier indicated, is also in line with the policy. Moreover as a matter of practical common sense it is probable in the highest degree that, if the condition is sustained, these two "farmworkers' cottages" will in fact be tenanted by agricultural workers who are employed on the adjoining land.

Turning now to Mr. Megarry's main submission on the ultra vires issue, this is clearly stated in the plaintiffs' notice on this appeal in the following terms: "It was not within the "powers of a planning authority to prescribe conditions limiting "the occupation of a new building with reference to the per-"sonality of the occupier but only with reference to the nature "of the user thereof." The submission is that a planning authority cannot specify the persons who may live in a house but only the purposes for which it is to be used. This appears to put a limitation upon the power of the local authority which does not appear in section 14 of the Act nor in any other of its provisions to which our attention was called. It is not a very easy point to follow. The argument apparently concedes that the defendants in the present case could have made it a condition that the two cottages should only be used for the purpose of housing agricultural workers and it is not easy to appreciate any significant difference between that condition and a condition that the occupation of the cottages should be limited to persons employed in agriculture. However that may be, Mr. Megarry was constrained to admit that this fetter which he sought to place on a planning authority's power to impose conditions might be removed in certain cases. For example, I understood him to concede that a condition limiting occupation to workers on a neighbouring farm would be valid. It seems to me that such a condition would clearly be intra vires of the authority, as also would be a condition limiting the occupation of proposed new dwellings near a colliery to persons employed in it. Exceptions such as these (and many more were suggested in argument) afford, as it seems to me, compelling reasons for rejecting a restriction for which, in my judgment, no sufficient warrant is to be found in the Act itself.

It remains to consider whether the condition imposed by the defendants is void for uncertainty and this question has caused me considerable doubt. All the members of this court in *Crisp from the Fens Ltd.* v. *Rutland County Council*[11] stressed the importance of conditions such as those under consideration being clearly expressed. And, indeed, they were clearly right in doing so. A man's right to do what he likes with his own property has,

[11] (1950) 1 P. & C.R. 48.

of course, long since been abrogated in what the State conceives to be the interests of the community as a whole. But if a man is subjected to restrictions upon the use of property which is his, and for which he has paid, it is at least reasonable that he should know with some precision what those restrictions are. If the condition which the defendants imposed on Mr. Clark had been (for some other purpose) enshrined in a by-law, the breach of which would have involved him or anybody else in criminal proceedings, I should imagine it highly probable that the by-law would have been held invalid on the ground of uncertainty (*Scott* v. *Pilliner* [12]). The main reason why I take that view is the difficulty, which might frequently arise, of knowing whether an industry is or is not mainly dependent upon agriculture; or, in the case of an industry which is so dependent, whether and when it ceases to be so when it subsequently, and perhaps gradually, changes its activities. However, the condition is not a by-law and an enforcement notice for its breach is not a criminal proceeding. Under sections 23 and 24 of the Act of 1947 the defendants could serve an enforcement notice on the owners and occupiers of the cottages if the condition were broken, and if this were disregarded penal consequences might ensue for the occupiers, but not for the owners, unless they were shown to have caused or permitted the continued non-observance of the condition. Nevertheless, owners whose properties are subjected to such conditions as that imposed on Mr. Clark can have no clear idea as to what will be regarded as a breach of the condition and what will not; and this would in many, and possibly most, cases lead to difficulties in selling or letting the property, with a consequential depreciation in its value, trouble between landlord and tenant and considerable inconvenience to both. It is, in my judgment, quite wrong that a condition couched in such vague and ambiguous terms should be imposed by any planning authority, and I can only hope that it will never be imposed again. I feel there are two difficulties, however, in holding that the condition is invalid for uncertainty. In the first place, its language so far as relevant, is statutory in the sense that it was used in the Housing Acts of 1930 and 1936. That fact, in itself, would not operate as a deterrent to invalidating the condition on the ground that no sensible meaning could be attributed to it in some of its aspects. What, however, weighs with me is that it was not suggested before us that any difficulty or disputes have arisen from the language used in the Acts of 1930 and 1936; from which it is a legitimate inference that the statutory provisions in question have not worked unsatisfactorily in practice. Mr. Megarry pointed out that those provisions in the Housing Acts appear in a different context, and for a different purpose from those of the condition now in question, for they were introduced in connection with applications for subsidies. Mr. Megarry said

[12] [1904] 2 K.B. 855; 20 T.L.R. 662.

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that on such applications it is unnecessary to inquire in advance as to the exact limit of the permitted occupancies, and that the contributing authority need only satisfy itself whether a particular person who is proposed for occupation is an agricultural worker or not. Whilst not disregarding the force of this comment, I feel that it would be a strong thing to say that language which has been acted upon (albeit for a different purpose) for years, and without apparent difficulty, is incapable of sensible meaning. Secondly, one cannot divorce the terms of the condition from the subject-matter of the permission. This was not a large private residence of the kind which might be let for a term of years. The subject-matter was a pair of farmworkers' cottages to be built in an agricultural area. I have earlier indicated the probability that these will be let to persons who work on the neighbouring land. It is a further probability that such persons would have weekly tenancies or quarterly tenancies at most. There would not be the same difficulty arising from the condition in relation to such tenancies as might well arise if a property were let for a term of years, e.g., trouble between landlord and tenant. This appears to me to be a legitimate element to take into account; and combined with the Housing Act ancestry of the language in question it is, I think, enough (though only just enough) to save the condition from destruction. With some reluctance, therefore, and more than a little doubt, I am of opinion that this point, too, should be decided in the council's favour.

If, then, the condition is neither ultra vires the defendants nor void for uncertainty, the plaintiffs can only succeed on this appeal if they can establish that the force of the condition is now spent. For this point they rely in their statement of claim on the fact (admitted by the defendants) that after the cottages had been erected by Mr. Clark they "were first occupied for a substantial "period by persons whose employment was covered by the terms "of the aforesaid condition." Mr. Megarry submitted the point for our consideration but did not pretend that it was his best one. It is quite clear, to my mind, from the terms of the condition and of the reason, that the former was intended to have permanent, and not merely temporary, force and effect. The question needs no development or elaboration, so I will merely say that, in my opinion, it must be decided adversely to the plaintiffs.

For the above reasons, and those stated by Lord Evershed M.R., I agree that the appeal should be allowed.

Pearce L.J. The council are, by the terms of section 14 of the Town and Country Planning Act, 1947, entitled to grant permission "subject to such conditions as they think fit." The *Wednesbury* case [13] makes it clear that the court will not interfere with that discretion unless it is shown that the authority did not take into account the right considerations, that is, that they

[13] [1948] 1 K.B. 223.

disregarded something which they should have taken into account or regarded something which they should not have taken into account. The onus of showing this is on the person seeking to upset the condition imposed by the authority. That onus may be discharged either by showing from the terms of the condition itself that the authority cannot have taken into account the right considerations or by extrinsic evidence to that effect. The principle has not been affected or altered by *Prescott* v. *Birmingham Corporation.*[14] That case was decided on the ground that the corporation owed a fiduciary duty to the ratepayers and had misapprehended the nature and scope of the discretion vested in them. Here there is no such element.

When no reasons are given and decisions of the authority present what Lord Sumner called in another context "the "inscrutable face of a sphinx," it is hard to discharge such an onus. However, in the case of conditions imposed under section 14 it has been provided (by a statutory rule and order) that reasons must be given. No doubt the purpose of that is to help and to inform the persons on whom conditions are imposed. Moreover, by the last four lines of section 14 (1), and by section 36, indication has been given of the matters which the authority must take into account. But the general principle remains that the condition cannot be upset by this court unless it be shown that the authority have not taken into account the right matters.

Mr. Megarry argues that the court can criticise and interfere with the condition itself, even if the right matters have been taken into account. With all respect to his argument, I do not think that that is the right approach. But it is perhaps rather a question of words than a matter of substance. He is quite right to my mind in suggesting that the court will interfere if a condition is ridiculous. But the reason for the inference is that the court will conclude from the folly of the condition that, however good the reasons which the authority say they took into account, they cannot, in fact, have taken into account the right considerations. For one essential matter which the authority must take into account is the imposing of an intelligible condition which can have some effect in achieving the other matters which they have properly taken into account. Thus, although he and Mr. Widgery travel by a different route in their arguments, they arrive at results which are not very far apart.

The court will, of course, hold a condition ultra vires if it does not "fairly and reasonably relate to the permitted develop-"ment" (see Lord Denning's judgment in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[15]), but in this case it does so relate. Here there is no extrinsic evidence that the authority did not take the right matters into account. In my

[14] [1955] 1 Ch. 210; [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698.

[15] [1958] 1 Q.B. 554, 572.

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view, therefore, the question in the case before us is this. The authority having on the face of the expressed reasons taken the proper matters into account, can one infer merely from the possible absurdity or the inefficiency or uncertainty of the condition that they did not in fact do so? If the condition is absurd, or if it is sufficiently uncertain or inefficient, or sufficiently combines these qualities, I should have no hesitation in so inferring. So viewed, the question of uncertainty is not a separate point but merely one of the points whose cumulative effect may prove that the council cannot have taken the right things into account. There is no doubt that the condition is cumbrous and unsatisfactory, and can in extreme instances produce ridiculous results. There could be circumstances in which the cottages could be occupied by rich retired canners from overseas or various other unsuitable persons who, like wraiths, have glided in and out of the arguments during the hearing of this case. But there are many legal principles which on their border-lines in some unlikely set of circumstances produce injustice or even absurdity. And in the case of a condition seeking to affect the character of the local population in the complexities of modern life, there may be difficulty in ensuring that application of that condition cannot at times produce ridiculous results.

To my mind, therefore, the possibility of absurdities is not in itself the true test. The test is: Are the absurdities and anomalies and uncertainties not merely theoretically possible but also so probable that they neutralise any beneficial results that the condition could have from a town planning point of view? And, therefore, is the net effect of the condition, looked at broadly, that it cannot be said to advance the town planning objects which are its ostensible justification? If a reasonable person could hold that it would so advance the town planning objects, then the court should not interfere. In framing the condition the authority have taken the wide, loose definition of "agricultural population" (to which, in general terms, they wished to limit the occupation of the cottages) from the Housing Act, 1936, s. 115 (2), together with the extended definition of "agriculture" contained in section 119 (1) of the Town and Country Planning Act, 1947. But it is no answer, as Mr. Megarry rightly says, to an accusation of uncertainty that the condition contains words used in an Act of Parliament in another context. Had the clause ended at the words "or in forestry," most of the possible absurdities and uncertainties would have been avoided. The remaining words were unfortunately added, presumably with an intention of liberality, to increase the field of the possible occupants. And it would be unfortunate if words added to give a more liberal scope should destroy the whole condition. From a practical point of view I do not feel that the uncertainty is likely to produce expense or injustice. If a would-be tenant is on the border-line, he would probably not be accepted. And, if he was accepted, the justices would in any enforcement proceedings feel

both bound and inclined to give the tenant the benefit of any doubt that there could be. The condition is far from satisfactory. The authority ought not to impose a permanent fetter on a house without a careful consideration of its nature and careful consideration of how and when it should be removed or altered if changed circumstances make its removal or alteration just. It is only after some doubt that I have arrived at the view that the condition itself is not so unsatisfactory that it can be said to fulfil no town planning purpose, and thereby to supply evidence that the authority did not take the proper matters into account. I think that this condition, looked at broadly, could on the whole be said to contribute to the maintenance of a green belt in the area. The cottages are small and in rural surroundings. The exclusion of many urban classes of population will tend in general towards limiting their occupation to rural persons who make them a permanent and not a week-end home. The persons who make their homes there are more likely to be people who are working than people who have retired, since, in general, the former exceed the latter in number. People who are working are more likely to be working locally since the occupants will tend to be persons of small means. In the main this condition does make the cottages available to people who may need to live in the country, and does exclude many of the community who do not have to live in the country.

Mr. Megarry further argues that the Act confers no power to impose conditions restricting the persons, or classes of persons, who may use the property, but only a power to impose conditions restricting the purpose for which it is used. In my view, that argument certainly cannot be accepted in terms so broad. The Act itself contains no express words limiting the scope of the conditions; and I think that the legislature must be taken to envisage some restriction on the persons occupying premises, since that itself is often the only means of restricting the purpose, e.g., a farm cottage restricted to the farm hand or the bailiff, a building near a hospital restricted to the housing of nurses. Where then, can one draw the line? It might be arguable that a restriction to a class of person fulfilling some office in relation to the adjoining land is the only permissible restriction. But that is a tenuous distinction, and I see no justification for inferring it. I think that restriction of persons is permissible if that restriction is of persons in relation to town planning, that is to say, if the restriction is genuinely directed to securing for a given locality a certain class of occupant from a town planning point of view. It is clear that such restrictions should be closely watched. For, if they are imposed from some housing or public health or social consideration other than town planning, the authority would be taking a wrong matter into account and the restriction would, on that ground, be invalid. (See *Pilling* v. *Abergele Urban District Council.*[16]) But in the case before us the restriction does not offend in that respect.

[16] [1950] 1 K.B. 636; 66 T.L.R. (Pt. 1) 166; [1950] 1 All E.R. 76.

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I cannot accept the further argument that the condition has spent its force after the first tenant has gone into occupation in accordance with it. The natural meaning of the words plainly restricts all future tenancies. There is no room for any implication that only the first tenancy is affected by them, and no ground on which such an implication could be justified.

I have come to the conclusion, not without some reluctance, that the appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for R. E. Millard, Aylesbury; A. L. Philips & Co.*

E. D.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1959
May 11.
Lord Parker C.J., Donovan and Salmon JJ.

REGINA *v.* HARMAN.

Criminal Law—Court of Criminal Appeal—Sentence, appeal against—Jurisdiction of court—Failure to surrender to bail—Recognisance estreated with alternative of six months' imprisonment—Jurisdiction of Court of Criminal Appeal to hear appeal—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *ss.* 3, 21.

The appellant, who was granted bail pending his trial upon indictment for office-breaking and larceny, had failed to surrender to his bail. When his trial eventually took place at London Sessions, in addition to a sentence of three years' imprisonment for the offences to which he pleaded guilty the chairman said his recognisance of £100 was estreated and that, if he did not pay, the alternative was a further six months' imprisonment to be consecutive upon the three years. On appeal against that further sentence:—

Held, that the words "any order made on conviction" in section 21 of the Criminal Appeal Act, 1907 [1] (in which "sentence" is defined), meant any order made as a consequence of conviction and not any order made at the time of conviction. As the sentence of six months' imprisonment had nothing to do with the conviction the court had no jurisdiction under section 3 of the Act to entertain the appeal which was accordingly dismissed.

Rex v. *London Sessions, Ex parte Beaumont* [1951] 1 K.B. 557; [1951] 1 T.L.R. 258; [1951] 1 All E.R. 232 applied.

APPEAL AGAINST SENTENCE.

The appellant, James Alfred George Harman, together with two other men, pleaded guilty at County of London Sessions on

[1] Criminal Appeal Act, 1907, s. 3: "A person convicted on indictment "may appeal under this Act to the "Court of Criminal Appeal— . . . "(c) with the leave of the Court of "Criminal Appeal against the sen- "tence passed on his conviction, "unless the sentence is one fixed by "law."

S. 21: "The expression 'sentence' "includes any order of the court made "on conviction with reference to the "person convicted. . . ."

February 10, 1959, to two charges of office-breaking and larceny. The offences had been committed on July 18, 1958. The appellant had been granted bail by the magistrate in the sum of £100 but he failed to surrender to his bail and was not arrested until January 15, 1959. He was sentenced to three years' imprisonment for the offences to which he had pleaded guilty. His recognisance of £100 was estreated and later in the day the chairman (R. E. Seaton, Esq.) informed the appellant that if he failed to pay the £100 the alternative was a further six months' imprisonment to be consecutive upon the three years imposed for the shop-breaking and larceny. He appealed against that further sentence, claiming to be entitled to do so by virtue of section 3 of the Criminal Appeal Act, 1907.

Peter Bruce for the appellant.
Harold Cassel for the Crown.

The case cited in argument is referred to in the judgment.

LORD PARKER C.J. This appellant, together with two other men, pleaded guilty at London Sessions to office-breaking and larceny, and he was sentenced to three years' imprisonment. Apparently he was on bail at the time of his trial and he failed to surrender, and in sentencing him to three years' imprisonment the chairman said: "For this offence I think the appropriate "sentence is that you go to prison for three years; your recognis-"ance will be estreated; and you will have to report within the "provisions of the Criminal Justice Act." Later on that day he said, addressing the appellant: "Harman, I estreated your recog-"nisance of £100 this morning, but I omitted to tell you what the "alternative is if you do not pay. The alternative is a further "six months, to be consecutive upon the three years to which I "sentenced you."

The appellant now appeals to this court, not against his sentence of three years' imprisonment, but against what he says is a sentence of six months' imprisonment consecutive upon the three years if he does not pay the £100. As is well known, the jurisdiction of this court is limited by the Criminal Appeal Act, 1907, and, in regard to sentences, the jurisdiction is given by section 3 in the following terms: "A person convicted on indict-"ment may appeal under this Act to the Court of Criminal "Appeal— . . . (*c*) with the leave of the Court of Criminal Appeal "against the sentence passed on his conviction, unless the sen-"tence is one fixed by law." By section 21 of the same Act, the definition section: "The expression 'sentence' includes any "order of the court made on conviction with reference to the "person convicted. . . ."

On that, Mr. Bruce for the appellant says that whatever may have happened in any other case, in the present case the order of six months' imprisonment was an order of the court made on

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conviction, that is, at or about the time of conviction and with reference to the person convicted. That, no doubt, is true, but it seems perfectly clear to this court, quite apart from authority, that where the section says "any order of the court made on "conviction," it must mean "made as a consequence of convic- "tion." Indeed, the matter has already come before the Divisional Court in *Rex* v. *London Sessions, Ex parte Beaumont*,[1] in regard to corresponding words in section 36 of the Criminal Justice Act, 1948. That section is in the following terms: "A "person convicted by a court of summary jurisdiction shall have "a right of appeal . . .", and by subsection (2): "For the pur- "pose of the last foregoing subsection, the expression 'sentence' "includes any order made on conviction by a court of summary "jurisdiction. . . ." In *Beaumont's* case,[1] it was held by the Divisional Court that the words "any order made on conviction" meant any order made as a consequence of a conviction and not an order made at the time of conviction.

The court feels that this is a very plain case and that this sentence of six months' imprisonment had nothing to do with the conviction. It may have been given at the time of and while sentencing the appellant on conviction, but it had nothing to do with the conviction, any more than if he had been acquitted and the recognisance had been estreated and a period of imprisonment ordered in default of payment. Accordingly, there is no jurisdiction in this court to entertain the appeal and it is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

E. M. W.

[1] [1951] 1 K.B. 557; [1951] 1 T.L.R. 258; [1951] 1 All E.R. 232.

[QUEEN'S BENCH DIVISION.]

1959
April 30;
May 12.

Lord Parker C.J., Donovan and Salmon JJ.

REGINA *v.* JUDGE SIR SHIRLEY WORTHINGTON-EVANS. *Ex parte* MADAN AND ANOTHER.

County Court—Practice—New trial—Successive applications for new trial—Judgment given in absence of defendant—Judgment set aside on terms—Terms not complied with—Proceedings transferred and judgment summons issued in other county court—Application for new trial on ground of fraud—Jurisdiction of judge of court to which proceedings transferred to order new trial—Whether application under Order 37, r. 2, exhaustive of jurisdiction to order new trial—Whether jurisdiction under Order 37, r. 1, to order new trial—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 95—*County Court Rules,* 1936 (*S.R. & O.* 1936, *No.* 626), *Ord.* 25, *r.* 48; *Ord.* 37, *rr.* 1, 2.

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Crown Practice—Certiorari—Inferior tribunal—County court—Whether certiorari will lie to quash order of county court judge made without jurisdiction.

Plaintiffs brought two actions in the Bloomsbury County Court against the defendant, claiming, in the first action, possession of certain premises and mesne profits, and in the second action damages for alleged conversion of goods at the premises. No defence was put in and on July 8, 1958, the judge, after hearing evidence, gave judgment for the plaintiffs. On July 24 the defendant applied to the judge that the judgments be set aside and new trials be ordered on the ground that he had not been represented at the hearing owing to a misunderstanding as to the date. The judge (acting under rule 2 of Order 37 of the County Court Rules, 1936 [1]) granted the application on terms that the defendant paid into court on or before October 1 a sum of money in each action. The terms were not complied with and the plaintiffs issued judgment summonses in the Clerkenwell County Court, the court having jurisdiction for the defendant's address pursuant to Order 25, r. 48. The defendant gave notice that he intended to apply to the court in each action to grant him "each and every form of relief necessary to defeat "fraud." That application was heard by the judge of the Clerkenwell County Court on December 18, 1958, who, after an affidavit sworn by the defendant had been read, made orders (under rule 1 of Order 37) that the judgments in the actions and all subsequent proceedings thereon be set aside and new trials be had between the parties. On an application by the plaintiffs for an order of certiorari to quash the orders of December 18, 1958, on the ground that the judge of the Clerkenwell County Court had had no jurisdiction to make them:—

Held, (1) that rules 1 and 2 of Order 37 of the County Court Rules, 1936, did not designate the individual judge who tried the case as the only judge with power to order a new trial, and that where proceedings were transferred under Order 25, r. 48, the judge of the court to which the proceedings had been so transferred had jurisdiction in a proper case to order a new trial. It was irrelevant,

[1] County Courts Act, 1934, s. 95: "Every judgment and order of a "county court shall, except as pro- "vided by this or any other Act or "county court rules, be final and "conclusive between the parties."

County Court Rules, 1936, Ord. 37, r. 1: "(1) The judge shall in every "case have the power to order a new "trial to be had upon such terms as "he thinks reasonable, and in the "meantime to stay the proceedings."

R. 2: "(1) Where a defendant to "an action . . . does not appear at "the hearing and a judgment or order "is given or made against him in his "absence, the judgment or order and "any execution thereon may on "application be set aside and a new "trial may be granted. . . . (3) The "application shall be made to the "judge if the judgment or order was "given or made by the judge and in "any other case to the registrar."

R. 3: "Where in a default action "judgment is entered in default of "delivery of a defence . . . and the "defendant satisfactorily explains his "default and satisfies the court that "he has a defence . . . which "ought to be heard, the court may, "on application made on notice, set "aside the judgment and execution "thereon . . ."

Ord. 25, r. 48: "(1) Where a "judgment creditor desires to issue a "judgment summons in a court other "than the court in which the judg- "ment or order was given or made ". . . (2) The judgment creditor may "make an ex parte application . . . "to the court in which the judgment "or order was given or made for the "transfer of the proceedings to a "court having jurisdiction to issue the "judgment summons and to be named "in the application. (3) On receipt "of the application the registrar shall "(*a*) make an order transferring the "proceedings to the named court; ". . ."

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therefore, that the orders of December 18, 1958, had been made by the judge of the Clerkenwell County Court and not by the judge of the Bloomsbury County Court who had tried the original actions.

(2) That rule 2 of Order 37 dealt with the specific case of a judgment given in the absence of a defendant, whereas under rule 1 there was a general power to order a new trial, and that although, once an application for a new trial had been allowed or refused under a particular provision, no further application could be entertained under the same provision (so that once the application for a new trial had been granted on terms by the Bloomsbury County Court judge no second application under the same rule 2 could be granted), the exercise of jurisdiction under rule 2 was exhaustive of the jurisdiction under that rule only, and not of the jurisdiction arising in different circumstances under rule 1; accordingly, the judge of the Clerkenwell County Court had jurisdiction to make the orders in question and the plaintiffs' application must be refused.

Moxon v. *London Tramways Co.* (1888) 57 L.J.Q.B. 446; 36 W.R. 668 (affirmed C.A., 37 W.R. 132; sub nom. *Reg.* v. *Greenwich County Court Judge and Moxon*) applied.

Great Northern Railway Co. v. *Mossop* (1855) 17 C.B. 130 distinguished.

In a proper case the High Court has power by certiorari to bring up and quash the order of a county court judge made without jurisdiction in that behalf.

APPLICATIONS for orders of certiorari and prohibition.

The applicants, Bhupinder Singh Madan and Gurmail Singh Sooch (hereinafter called the plaintiffs), in two actions commenced in the Bloomsbury County Court against the respondent, Vaidymath Shastri Sharma (hereinafter called the defendant), by plaints Nos. O. 745 and O. 746 sought an order of certiorari to bring up and quash two orders dated December 18, 1958, made by Judge Sir Shirley Worthington-Evans in Clerkenwell County Court whereby the judge ordered that the judgments in the two actions and all subsequent proceedings thereon be set aside and that new trials be had between the parties on March 9, 1959. The plaintiffs also sought an order of prohibition directed to Judge Sir Shirley Worthington-Evans and to the defendant prohibiting them from further proceeding in the actions.

The following statement of facts is taken from the judgment of the court. Plaint No. O. 745 was for recovery of possession of some premises at 137, Whitfield Street, London, of which the plaintiffs had given a tenancy to the defendant, which they claimed had been duly determined by notice. There was also a claim for mesne profits. Plaint No. O. 746 was for £20 damages for alleged conversion by the defendant to his own use of goods belonging to the plaintiffs at the same premises. After the defendant had unsuccessfully sought an injunction in the Chancery Division against being excluded from the premises by the plaintiffs, the two actions came on for hearing in the Bloomsbury County Court on July 8, 1958, before Judge Alun Pugh. No defence had been put in by the defendant and he did not appear and was not represented. After hearing evidence

the judge gave judgment for the plaintiffs, in the first action for £130 mesne profits, the defendant having quit the premises on May 25, 1958, and for £20 damages in the second action. He awarded costs to the plaintiffs.

On July 24, 1958, the defendant applied to the same county court judge for orders that the two judgments of July 8, 1958, be set aside and that new trials be ordered. The application was made on the ground that the defendant was not represented at the hearing on July 8 owing to a mistake as to the date of the hearing. The judge granted the application on terms that the defendant pay into court the sum of £90 in the first action and the sum of £10 in the second action. It was a further term that the defendant also paid into court the amount of the plaintiffs' taxed costs to date. These payments were to be made on or before October 1, 1958. The defendant failed to do this. None of these sums were paid into court by that date or at any time thereafter. Two judgment summonses were thereupon issued in the Clerkenwell County Court (the court having jurisdiction for the defendant's current address), and after one adjournment these summonses were due to be heard on December 18, 1958. On December 10 the defendant gave notice to the plaintiffs that he intended to apply to the court in each action to grant him "each and every form of relief necessary "to defeat fraud."

That application was heard by Judge Sir Shirley Worthington-Evans on December 18, 1958, when the defendant was represented by counsel. An affidavit sworn by him was read to the effect that he had been defrauded by the plaintiffs in that as they well knew they had no right or title to grant him the tenancy of the premises in question and that they had therefore obtained an advance payment of rent from him amounting to £104 by fraud. The judge ordered (as set out above) that the judgments in the actions and in all subsequent proceedings thereon be set aside and that a new trial be had between the parties.

The plaintiffs sought an order of certiorari in respect of those orders on the ground that the judge exceeded his jurisdiction and had no power to make the orders. They contended (1) that the orders of Judge Alun Pugh dated July 24, 1958, were final and conclusive and could not be reversed except on appeal; and that after the making of those orders no further order could be made setting aside the judgments except on appeal and that the effect of the orders dated December 18, 1958, was to reverse the orders of July 24, 1958; and (2) that if, contrary to their contention, any county court judge had jurisdiction to make further orders setting aside the judgments after the defendant had failed to comply with the terms of the orders of July 24, 1958, the only judge who had such jurisdiction pursuant to Order 37, rule 2, of the County Court Rules, 1936, was Judge Alun Pugh.

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A. J. Balcombe for the applicant plaintiffs.

R. J. Trott for the defendants.

The following cases were cited in argument: *Great Northern Railway Co.* v. *Mossop* [2]; *Reg.* v. *Greenwich County Court Judge and Moxon* [3]; *Moxon* v. *London Tramways Co.* [4]; *Kemp* v. *Balne* [5]; *Colonial Bank of Australasia* v. *Willan* [6] and *Ex parte Bradlaugh.* [7]

Cur. adv. vult.

May 12. Lord Parker C.J. Donovan J. will give the judgment of the court.

Donovan J. read the following judgment of the court in which he stated the facts and continued: The judge, with both parties before him, made orders that the judgments in the actions and in all subsequent proceedings thereon be set aside and that a new trial be had between the parties on March 9, 1959. These are the orders which Mr. Balcombe on behalf of the plaintiffs moves to quash. He says that Judge Sir Shirley Worthington-Evans was without jurisdiction to make them. Alternatively, he argues that if there were any such jurisdiction it resided solely in Judge Alun Pugh, being the county court judge at Bloomsbury who tried the actions originally.

We are satisfied that in a proper case this court has power by certiorari to bring up and quash the order of a county court judge made without jurisdiction in that behalf. (See hereon *Kemp* v. *Balne* * and *Colonial Bank of Australasia* v. *Willan.*†)

We are also satisfied that it is irrelevant that the original actions were tried by the county court judge at Bloomsbury and that the order now under consideration for a new trial was made by the county court judge at Clerkenwell.

Order 37, rule 1, of the County Court Rules, 1936, does say that "the judge" shall have power to order a new trial; and rule 2 of the same order speaks (inter alia) of an application for a new trial under that rule being made "to the judge if "the judgment or order was given or made by the judge and "in any other case to the registrar." But in our view these provisions are not designating the individual judge who tried the case as the only judge with power to order a new trial. The difficulty which would arise upon such a construction in the event that the trial judge died before a new trial was applied for is at once apparent. Order 25, rule 48, dealing with the case of a judgment summons issued in a court other than the court in which the judgment was given (which is the present case) says

[2] (1855) 17 C.B. 130; 25 L.J. C.P. 22; 4 W.R. 116.

[3] (1888) 37 W.R. 132.

[4] (1888) 57 L.J.Q.B. 446; 36 W.R. 668.

[5] (1844) 1 D. & L. 885.

[6] (1874) L.R. 5 P.C. 417.

[7] (1878) L.R. 3 Q.B.D. 509.

* (1844) 1 D. & L. 885.

† (1874) L.R. 5 P.C. 417.

among other things that: " (2) The judgment creditor may make " an ex parte application in writing to the court in which the " judgment or order was given or made for the transfer of the " proceedings to a court having jurisdiction to issue the judg- " ment summons and to be named in the application. (3) On " receipt of the application the registrar shall (*a*) make an order " transferring the proceedings to the named court."

We think this is sufficient to give the judge of the court to which the proceedings have been so transferred jurisdiction in a proper case to order a new trial. It may be that the grounds for ordering a new trial will have emerged only after such transfer; and there is nothing in the language of the rules to compel the conclusion that any application for a new trial must be referred back to the court where the original trial was held.

The first order for a new trial in this case which was made on terms by Judge Alun Pugh was made under Order 37, rule 2. This provides: " Where a defendant to an action or matter or " a defendant to a counterclaim does not appear at the hearing " and a judgment or order is made or given against him in his " absence, the judgment or order and any execution thereon may " on application be set aside and a new trial may be granted."

The second application for a new trial was granted by Judge Sir Shirley Worthington-Evans under rule 1 of the same Order, which reads thus: " The judge shall in every case have the " power to order a new trial to be had upon such terms as he " thinks reasonable, and in the meantime to stay the proceed- " ings."

The problem in this case is whether this second order for a new trial could be granted at all, i.e., whether *any* county court judge would have the necessary jurisdiction to do so. It is not really material in this case that the first application was granted on terms which were not fulfilled or that the second application was made to the judge of the county court to which the proceedings were transferred. The question would be the same if Judge Alun Pugh had refused the first application altogether and had granted the second.

Mr. Balcombe's argument is that when once the first application was granted but the terms imposed had not been complied with, no application for a new trial could be granted by another county court judge, the jurisdiction to do so having been exhausted. In other words, under these rules once a new trial has been granted or refused there is an end of the matter. The county court judge (whether it be the original one or not) has become functus officio and is without jurisdiction to grant a second application.

For these propositions reliance is placed first on the County Courts Act, 1934, which provides, by section 95, that: " Every " judgment and order of a county court shall, except as provided " by this or any other Act or county court rules, be final and " conclusive between the parties."

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It is then pointed out that Order 37, rules 1 and 2, have their origin in sections 89 and 80 respectively of the County Courts Act, 1846. Section 80, after conferring power to proceed to trial in the absence of a defendant, went on by the proviso to enact that the "judge in any such case, at the same or any subsequent "court, may set aside any judgment so given in the absence of "the defendant, and the execution thereupon, and may grant a "new trial of the cause, upon such terms . . . as he may think "fit. . . ." Section 89 provided: "every order and judgment "of any court holden under this Act, except as herein provided, "shall be final and conclusive between the parties, but the "judge . . . shall also in every case whatever have the power, "if he shall think fit, to order a new trial to be had upon such "terms as he shall think reasonable, and in the meantime to "stay the proceedings."

It will be seen that section 80 was intended to cover the case where the defendant did not appear. The trial might proceed to judgment in his absence, but if that absence was later found to be, for some reason or another, excusable, a new trial might be granted. Section 89 on the other hand was quite general in its terms, and indeed its concluding words may be wide enough to cover the case contemplated by section 80. The proviso to section 80 was possibly inserted ex majore cautela, and to allay a fear that a defendant who had unavoidably been prevented from attending the court on the day of the trial would never be able thereafter to put his case. However that may be, the position in 1846 was that power to order a new trial was given to the county court judge under two sections of the Act, one dealing with the specific case of judgment given in the absence of the defendant and the other in "every case whatever." The effect of these sections is now reproduced in current legislation by section 95 of the Act of 1934 and by Order 37, rules 1 and 2.

In *Great Northern Railway Co.* v. *Mossop*,[3] decided in 1855, it was held that once a county court judge in the exercise of his discretion under section 89 had refused to grant a new trial, he could not thereafter change his mind on a fresh application under the same section. Willes J., after quoting section 89, said[4]: "That is a power to be exercised, not with reference to inter-"locutory matters, but with reference to the final judgment, "which, unless a new trial is granted, must be considered a "settled matter. Immediately that the judge has exercised his "discretion to grant or to refuse a new trial, the exception to "the general rule is exhausted, and the general rule must prevail. "The decision once pronounced, there ought to be an end of "the matter; especially where the decision has been acted upon, "and the fruits of the judgment reaped."

This case was distinguished in *Moxon* v. *London Tramways*

[3] (1855) 17 C.B. 130.

[4] 17 C.B. 130, 141.

Co.[5] Section 89 of the Act of 1846 was again in point and it was there held on the facts that the first refusal of the judge to grant a new trial was provisional only, and subject to the right which the judge gave to the applicant to renew the same application on a fresh ground. Wills J. said[6]: "He [the county court judge] "reserved to himself a discretion. The time was also in his "control, and he gave leave to the plaintiffs to apply again. "*Great Northern Railway Co.* v. *Mossop*[7] was decided on "the ground that the county court judge had on the second "occasion reversed his original decision on the same grounds, "that is, he went back on his own judgment. The judgments "of the learned judges in that case show that when a judge has "fully exercised his jurisdiction and discretion in a matter, then "the cause is at an end. But that is not so here; and the effect "of *Mossop's* case[8] must be confined to a similar state of facts." In other words, it was held in that case that the judge had not finally determined the matter.

In the case now before the court the county court judge at Bloomsbury granted new trials on terms which were not complied with. The grant, therefore, lapsed and the resulting position for practical purposes is the same as if the application had been refused. The application was made under rule 2 of Order 37, which corresponds with section 80 of the Act of 1846. It seems clear on the authorities I have quoted that no second application for a new trial could be entertained under the same rule 2.

The application before the county court judge at Clerkenwell was made and granted under rule 1 of the order, which corresponds to section 89 of the Act of 1846. There was no previous application under this rule for a new trial in this case. The question, therefore, becomes this: If an application for a new trial under rule 2 is refused, or is granted but becomes inoperative owing to the non-fulfilment of the terms imposed, does that deprive a county court judge of jurisdiction to grant an application for a new trial under rule ? As to this, it has to be remembered that rule 2 deals with the specific case of a judgment given in the absence of a defendant and with that case alone. It is difficult to understand upon what principle the exercise of jurisdiction in this limited field should extinguish the general power given to the county court judge under rule 1. There is no authority which compels us to this conclusion, the decided cases being authority for this proposition only, namely, that once an application for a new trial is allowed or refused under a particular provision, no further application can be entertained under the same provision. Furthermore, it would be a surprising result and one which Parliament could hardly have intended, namely, that if a defendant in the county court discovers that a judgment had been

[5] (1888) 57 L.J.Q.B. 446; 36 W.R. 668.
[6] 57 L.J.Q.B. 446, 448.
[7] 17 C.B. 130.
[8] Ibid.

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obtained against him by fraud, he is nevertheless debarred from asking for a new trial simply on the ground that a previous application had been made under a different rule dealing with an entirely different situation. The anomaly would all the more be marked where, as seems to be the case here, the application under rule 2 succeeded, but the applicant was unable to comply with the condition as to payment of money into court. In our judgment there is no ground for holding that the exercise of jurisdiction under rule 2 is exhaustive of the jurisdiction not only under that rule but also under rule 1 as well, and accordingly we refuse the order asked for.

The application for a writ of prohibition fails for the same reasons.

Applications dismissed.

Solicitors: *David Schayek & Co.; Probyn, Dighton & Parkhouse.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1959 *Mar.* 11, 12; *May* 11.

Hodson, Romer and Willmer L.JJ.

CLACK *v.* ARTHUR'S ENGINEERING LTD.

County Court—Practice—Non-suit—Facts decided against plaintiff—Order of non-suit without consulting parties—Judicial discretion—County Court Rules, 1936 (*S.R. & O.,* 1936, *No.* 626), *Ord.* 23, *r.* 3.

The plaintiff entered the service of the defendants as works manager, but his employment was terminated by the defendants at the end of the first week and he was paid a week's salary and an additional week's pay in lieu of notice. He claimed that although paid weekly he was engaged for a month's trial period in the first instance. He therefore sued the defendants for the balance of a month's salary, amounting to £65 18s. It was not pleaded that the notice was inadequate. The defendants denied that there had been any engagement for a month's trial period. The county court judge, having heard evidence on both sides, found that the plaintiff had not proved his case, but invited him to amend his particulars of claim; this his counsel elected not to do and the judge then non-suited the plaintiff under Order 23, r. 3, of the County Court Rules, 1936,[1] and awarded the costs to the defendants. The defendants appealed:—

Held, (1) that once the evidence had been completed and the judge had found the facts, he had an unfettered discretion to enter a non-suit regardless of the absence of consent of the plaintiff.

[1] County Court Rules, 1936, Ord. 23, r. 3: "(1) Where the plaintiff "appears but does not prove his "claim to the satisfaction of the "court, it may either non-suit him, "or give judgment for the defendant. "(2) Where—(*a*) after a plaintiff has "been non-suited; or (*b*) after an "action has been struck out; a sub-"sequent action for the same or sub-"stantially the same cause of action "is brought before payment of any "costs awarded to the defendant "when the plaintiff was non-suited "or the proceedings were struck out, "the court may stay the subsequent "action until such costs have been "paid."

(2) That Order 23, r. 3, applied, not only when the evidence fell short of proving the pleaded case, but also where the plaintiff's evidence, but for the fact that it was disbelieved, would have substantiated his claim.

National Cash Register v. *Stanley* [1921] 3 K.B. 292 applied.

Westgate v. *Crowe* [1908] 1 K.B. 24 distinguished.

But (3), that the judge had failed to exercise his discretion judicially in that (a) he arrived at his decision to non-suit the plaintiff without hearing counsel on either side; and (b) the plaintiff had elected not to accept the invitation to amend his particulars of claim and should not be granted the concession of a non-suit when he had already had his chance to frame his case in an alternative way, for the overriding consideration was that, in the public interest, there should be an end to litigation.

Per curiam. Consideration might well be given to the desirability of abolishing the power to non-suit in the county court, as it has been abolished in the High Court.

APPEAL from Judge Reid, sitting at Kingston-upon-Thames County Court.

The plaintiff, Christopher Sidney Clack, having entered the services of the defendants, Arthur's Engineering Ltd., as works manager, his contract of employment was terminated at the end of the first week and he was paid an additional week's salary in lieu of notice. He asserted that although paid weekly he was engaged for a month's trial period, and he claimed for the balance of a month's salary, amounting to £65 18s. The defendants denied that there was any engagement for a month's trial period and contended that as the plaintiff was paid weekly he was only entitled to a week's salary in lieu of notice.

The county court judge, having found that the plaintiff had failed to prove his claim, invited him, by his counsel, to amend his particulars of claim, but counsel expressed himself as satisfied with the claim as it stood. The judge thereupon non-suited the plaintiff and awarded the costs to the defendants. The defendants appealed, contending (1) that the power to non-suit a plaintiff could not be exercised without the consent of the plaintiff and that consent had not been given or asked; (2) that Order 23, r. 3, of the County Court Rules, 1936, had no application to the present case, where the plaintiff's evidence, if it had been accepted, would have fully proved his case, and (3) that if Order 23, r. 3, applied the judge had not exercised his discretion judicially and should have given judgment to the defendants.

Marcus Anwyl-Davies for the defendants.

John Deby for the plaintiff.

In addition to authorities cited in the judgment the following cases were referred to: *Poyser* v. *Minors* [2]; *Cross* v. *Rex* [3]; and *Ryder* v. *Wombwell.* [4]

Cur. adv. vult.

[2] (1881) 7 Q.B.D. 329.
[3] (1912) 29 T.L.R. 85.
[4] (1868) L.R. 4 Ex.Cas. 32.

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May 11. Willmer L.J. read the following judgment of the court. In this case the defendants appeal from a judgment of His Honour Judge Reid, given at Kingston-upon-Thames County Court on October 28, 1958, whereby he non-suited the plaintiff and awarded costs to the defendants. It is contended that judgment ought to have been entered for the defendants with costs.

The plaintiff claimed damages from the defendants for wrongfully terminating his contract of employment as works manager. His case was that, though paid weekly, he was engaged for a month's trial period in the first instance. The defendants, however, terminated his employment at the end of the first week, paying him an additional week's salary in lieu of notice. The plaintiff's claim was, therefore, for the balance of a month's salary, amounting to £65 18s. The defendants denied that there was any engagement for a month's trial period, and contended that as the plaintiff was paid weekly they were entitled to dismiss him with a week's notice, or with a week's salary in lieu of notice.

The judge, having heard evidence from the plaintiff and from Mr. Arthur for the defendants, preferred the evidence of Mr. Arthur, and found that the plaintiff had failed to prove his claim to have been engaged for a month in the first instance. He held that on the pleadings as they stood no other question arose, and in particular that no question arose as to whether, apart from the alleged engagement for a month, the notice received by the plaintiff was a proper notice. After the conclusion of the evidence, and before giving judgment, the judge had invited counsel for the plaintiff to consider whether he was satisfied with the particulars of claim as they stood—a clear invitation, as it seems to us, to amend the particulars of claim so as to put forward an alternative claim that the plaintiff was dismissed without reasonable notice. Counsel for the plaintiff, however, expressed himself as satisfied with the particulars of claim as they stood, so that the judge was left with only the one issue to determine, namely, whether the plaintiff had made out his case that he was engaged for one month.

In these circumstances the judge, having found that the plaintiff had failed to establish the case set up in the particulars of claim, concluded his judgment as follows: "The plaintiff "therefore cannot succeed. But I am not altogether satisfied "that proper justice would have been done if judgment were "given for the defendants, and this seems to me to be one of "the rare cases in which the plaintiff should be non-suited."

Since the introduction of the 1883 Rules of the Supreme Court, the High Court retains no power to enter a non-suit: see *Fox* v. *Star Newspaper*.[1] But in the county court the power survives, and is specifically preserved by Order 23, r. 3, of the County Court Rules, 1936. [His Lordship read the rule and

[1] [1900] A.C. 19.

continued:] It follows that, in the present case, on the judgment of the judge, the plaintiff would be free, upon payment of the defendants' costs, to institute a fresh action in which he would be able to make a second claim for damages for wrongful dismissal, which, in the light of what the judge said, would no doubt be based on the absence of reasonable notice. This, the defendants say, would be a hardship to them, and on this appeal they contend that the judge was wrong to non-suit the plaintiff, and that he ought to have entered judgment for the defendants.

Three submissions have been advanced on behalf of the defendants in support of the appeal. First, it has been contended that the power to non-suit a plaintiff cannot be exercised without the consent of the plaintiff. Here the plaintiff never consented to be non-suited, and was never invited to consent. Secondly, it has been urged that the rule has no application to a case such as the present, where the plaintiff's evidence, if it had been accepted, would have fully proved his case. This is not a case, it is pointed out, in which the plaintiff's evidence fell short of proving his pleaded case; on the contrary, the evidence would have proved the claim but for the fact that it was disbelieved. The defendants' third submission is that, assuming the rule to be applicable to the circumstances of this case, the judge failed to exercise his discretion judicially, in that he chose to non-suit the plaintiff, without being invited to do so, after the plaintiff by his counsel had specifically declined an invitation to amend the particulars of claim.

In order to appreciate the significance of the defendants' first submission it is necessary to refer briefly to the history of non-suit in the High Court and county court respectively. Before the Supreme Court of Judicature Act, 1873, there is no doubt that in the common law courts, which were the predecessors of the Queen's Bench Division of the High Court, the power to enter a non-suit existed at common law. In the case of the county courts, however, their jurisdiction was wholly statutory, and the power of the court in relation to non-suit was defined by section 79 of the County Courts Act, 1846, the material part of which provided: "... if he shall appear, but shall not make "proof of his demand to the satisfaction of the court, it shall "be lawful for the judge to non-suit the plaintiff, or to give "judgment for the defendant."

Though the wording is different, the substance of that provision is in our judgment precisely the same as that of the present Order 23, r. 3 (1), of the County Court Rules, 1936. In 1852, in *Stancliffe* v. *Clarke*,[2] it was laid down by Parke B., in relation to section 79 of the Act of 1846, "that the term 'non-"'suit' is there used in the same sense as in ordinary law "proceedings," by which we understand him to have meant that non-suit had the same meaning in relation to proceedings in the county court as it had at common law. The Judicature

[2] (1852) 7 Ex. 439.

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Act of 1873 contained a provision whereby, in the High Court, a judgment of non-suit became a bar to subsequent proceedings in the same way as judgment for the defendant would be; and shortly afterwards a similar provision was introduced into the County Court Rules. This situation persisted, so far as the High Court was concerned, until 1883, when the Rules of the Supreme Court came into force. These, as previously mentioned, contained no provision whatever for non-suit, and since that date non-suit in its strict sense has found no place in the procedure of the High Court. We use the phrase "in its strict sense" because there have been a number of cases in which the expression "non-suit" has been loosely used in the High Court, where all that has been meant has been that the defendant had no case to answer: see, for example, *Fletcher* v. *London and North Western Railway Co.*,[3] where we think it must be clear that the term is used in this loose sense.

The history of non-suit in the county court has been somewhat different, for there, since 1888, the power to non-suit has been specifically preserved. The effect of section 88 of the County Courts Act, 1888, was substantially to re-enact section 79 of the Act of 1846, and, as has already been pointed out, the present rule in the County Court Rules, 1936, is for all practical purposes the same. For 70 years, therefore, there has been a divergence between the High Court and county court practice, so far as non-suit is concerned. This circumstance makes it impossible, in our judgment, to invoke section 100 of the County Courts Act, 1934, so as to interpret the county court rule relating to non-suit by reference to the present practice of the High Court. In relation to this we venture to differ from the view expressed by the editors of the County Court Practice in the first paragraph of the notes to Order 23, r. 3. Having regard to the similarity between the present rule and the provision of section 79 of the Act of 1846, we entertain no doubt that the powers of the county court today in relation to non-suit must be related to the practice of the old courts of common law as it existed prior to 1873.

In support of his proposition that, by the practice of the old common law courts, the power to non-suit a plaintiff could not be exercised without the plaintiff's consent, counsel for the defendants relied in the first instance on *Stancliffe* v. *Clarke*, where Parke B. said[4]: "It is optional with the plaintiff whether he "will submit to be non-suited; and in the event of his refusing, "if there is no case to warrant a verdict for him, it is the duty "of the judge to direct the jury to find for the defendant." Reliance was also placed on *Robinson* v. *Lawrence*,[5] *Outhwaite* v. *Hudson*,[6] and *Kershaw* v. *Chantler*.[7] In *Robinson* v. *Lawrence*,[8] where the appeal was by the defendant, Parke B. said: "The question was, whether or not the plaintiff in an

[3] [1892] 1 Q.B. 122.
[4] 7 Ex. 439, 446.
[5] 7 Ex. 123, 124.
[6] 7 Ex. 380, 381.
[7] (1872) 26 L.T. 474.
[8] 7 Ex. 123, 124.

"action for money had and received, in which there was a plea "of set-off, after the judge had taken time to consider, and "before the judge had delivered his verdict, could be non-suited: "and whether the judge had power to direct a non-suit, according "to the Acts of Parliament which regulate the county courts. "At common law, whenever the plaintiff ought to appear in "court, he was at liberty to withdraw. In the present case, "when the judge was about to deliver his opinion, and indeed "by the permission of the judge, the plaintiff withdrew. We "have looked through the County Court Acts, but do not find "any clause contained in them that prohibits the plaintiff from "exercising this common law right. We therefore think that in "this case the plaintiff was at liberty to be non-suited, and that "the judge was right in permitting him to be non-suited."

In *Outhwaite* v. *Hudson* [9] the claim was for breach of warranty of a horse. After the judge had directed the jury, and while the jury were deliberating, the plaintiff stated that he elected to be non-suited. The defendant objected, and the judge held that the plaintiff's election to be non-suited was too late. On appeal by the plaintiff it was held that the county court judge was wrong in refusing to allow the plaintiff to be non-suited. Parke B. said [10]: "The plaintiff's power of demanding to be non-suited "continued to the last moment—until the jury had given their "verdict; or, where the case is tried by a judge without the "intervention of a jury, until the judge has pronounced his "judgment."

Kershaw v. *Chantler* [11] was a case where the county court judge, after the completion of the plaintiff's case and during the hearing of the defendant's witnesses, discharged the jury, and, notwithstanding the repeated protests of the plaintiff and his attorney, and without the plaintiff's consent, directed a non-suit to be entered. It was held, upon a rule calling upon the judge to proceed with the trial of the cause, that the judge had acted judicially, and that therefore the court had no power to afford the plaintiff any remedy upon this rule. But the members of the court left no room for doubt that in their view the county court judge had been in error in thus non-suiting the plaintiff without his consent. Cockburn C.J. is reported as saying [12]: "I regret "much that we have no power on this rule to direct a new trial; "for with no propriety can a judge non-suit a plaintiff without "his consent."

If the matter stopped there, it would seem that the discretion which section 79 of the County Courts Act, 1846, appears by its terms to have conferred on the court "to non-suit the plaintiff, "or to give judgment for the defendant" was wholly illusory, and that there was in practice no discretion, the court being bound to abide by the election of the plaintiff. If that were true of the Act of 1846, we should, it seems, be bound to hold that

[9] 7 Ex. 380.
[10] Ibid. 381.
[11] 26 L.T. 474.
[12] Ibid. 475.

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the present Order 23, r. 3, of the County Court Rules, 1936, must be construed in the same way. But by way of contrast to the cases already cited reference should next be made to *Davis* v. *Hardy*,[13] to which our attention was called by counsel for the plaintiff. In that case, which was decided in 1827, the plaintiff claimed damages for malicious prosecution. At the conclusion of the plaintiff's case the judge indicated that in his view there was sufficient evidence of want of probable cause. The defendant accordingly called a witness, and on the conclusion of his evidence the judge intimated that on the whole of the evidence there was a probable cause for preferring the indictment. Counsel for the plaintiff insisted that it ought to be left to the jury to decide whether they believed the evidence of the defendant's witness. The judge, however, refused to leave any question to the jury, and non-suited the plaintiff. On appeal by the plaintiff it was held by Abbott C.J., with whom Bayley J. concurred, that the non-suit was proper, and that the rule for setting it aside must be discharged.

Here, then, was a case in which clearly the plaintiff was non-suited against his will, and at first sight it is a little difficult to reconcile this decision with the view expressed some twenty-five years later by Parke B. in *Stancliffe* v. *Clarke*[14] that "it is optional with the plaintiff whether he will submit to be non-"suited."

Reference may also usefully be made to Tidd's Practice (1828), 9th ed., vol. 2, p. 867, where the following statement appears: "If it be clear that, in point of law, the action will "not lie, the judge at nisi prius will non-suit the plaintiff, "although the objection appear on the record, and might be "taken advantage of by motion in arrest of judgment, or on a "writ of error. But where the case turns on a question of fact, "it ought to be submitted to the jury, unless the plaintiff's "counsel expressly assent to his being non-suited." We confess that we find the statement in the first sentence of this extract difficult to reconcile with the view expressed by Parke B. in *Stancliffe* v. *Clarke*,[14] that "if there is no case to warrant a "verdict for [the plaintiff], it is the duty of the judge to direct "the jury to find for the defendant." Equally, the second sentence is at variance with what was done in *Davis* v. *Hardy*,[15] and there is in fact a footnote calling attention to the discrepancy.

It is, however, relevant to remark that all the authorities to which we have so far referred related to cases where the question of non-suit arose before verdict. Before attempting to account for the apparent discrepancy between the decision in *Davis* v. *Hardy*[15] and those in the other cases referred to, it is useful to examine the practice in relation to non-suit after verdict. No such cases were cited to us in argument, but an examination of the reports of cases during the first half of the nineteenth century

[13] (1827) 6 B. & C. 225.
[14] 7 Ex. 439.
[15] 6 B. & C. 225.

reveals the fact that it was a frequent occurrence for a plaintiff to be non-suited after verdict quite regardless of his own wishes. By way of illustration we may perhaps refer to two cases which happen to have been cited to this court in another connection since the conclusion of the argument in the present appeal. It appears from *Doe* d. *Armstrong* v. *Wilkinson*[16] that after the verdict of the jury the defendant was entitled to move for a non-suit, and the court had a discretion to grant or refuse it. Similarly, *Doe* d. *Duke of Bedford* v. *Kightley*[17] seems to have been a case of non-suit after verdict against the plaintiff's wish, and upon the plaintiff obtaining a rule to set aside the non-suit, which was opposed by the defendant, the rule was made absolute. Other cases are to be found in the reports where a verdict was given for the plaintiff, but with leave to the defendant to move to set that verdict aside and to enter a non-suit.

From an examination of all these cases it seems possible to draw the following conclusions: (1) At any time up to verdict, if the plaintiff elected to be non-suited he was entitled to it as of right, and the court had no discretion to refuse: see *Robinson* v. *Lawrence*[18]; *Outhwaite* v. *Hudson*.[19]

(2) If before verdict the plaintiff refused to be non-suited, the position is not so clear. If the statement in Tidd's Practice is correct the plaintiff could apparently be non-suited if his action was not sustainable in point of law. And it would appear from *Davis* v. *Hardy*,[20] notwithstanding the contrary view expressed in Tidd's Practice, that, where all the evidence on both sides had been taken, the court had a discretion to enter a non-suit, even against the expressed wish of the plaintiff that the evidence should go to the jury. The apparently contrary views expressed in *Stancliffe* v. *Clarke*[21] and *Kershaw* v. *Chantler*[22] may perhaps be explained on other grounds. In *Stancliffe* v. *Clarke* there was a submission of no case, and it was in this context that Parke B. said that a non-suit against the will of the plaintiff was not allowable, but that if there was no case it was the duty of the judge to direct a verdict for the defendant. In *Kershaw* v. *Chantler* it was during the hearing of the defendants' witnesses that the judge discharged the jury and, without the plaintiff's consent, directed a non-suit to be entered. It may be, therefore, that the apparent discrepancy between those decisions and that in *Davis* v. *Hardy*[23] is to be explained on the basis that in the former cases the relevant question was whether a non-suit without the plaintiff's consent was admissible at so early a stage in the case.

(3) Once the evidence had been completed and the verdict of the jury taken—or, where there was no jury, once the judge had found the facts—it seems clear that the court had an unfettered

[16] (1840) 12 Ad. & El. 743.
[17] (1796) 7 Term R. 63.
[18] 7 Ex. 124.
[19] 7 Ex. 380.
[20] 6 B. & C. 225.
[21] 7 Ex. 439.
[22] 26 L.T. 474.
[23] 6 B. & C. 225.

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discretion, if the verdict was against the plaintiff, either to enter a non-suit or to give judgment for the defendant.

If this analysis of the procedure before the old courts of common law is correct, it seems to us to be destructive of the first submission put forward on behalf of the defendants. The present case clearly belongs to the third class mentioned above, in that the judge decided to non-suit the plaintiff only after all the evidence had been given and he himself had given his judgment on the facts. In such a situation it seems clear that, following the old practice of the courts of common law, the judge had an unfettered discretion to enter a non-suit regardless of the absence of consent on the part of the plaintiff. The defendants, therefore have no cause for complaint on this appeal merely on the ground that the plaintiff was non-suited without his consent.

We pass, therefore, to the second submission put forward on behalf of the defendants—namely, that Order 23, r. 3, of the County Court Rules, 1936, has no application to a case such as the present, where the plaintiff's evidence, but for the fact that it was disbelieved, would have fully substantiated the claim put forward on his behalf. The contention is that the rule, on its true construction, applies only to a case where the evidence called for the plaintiff falls short of substantiating the pleaded case. Reliance is placed on the wording of the rule, which refers to a plaintiff who "does not prove his claim to the satisfaction "of the court"—words which, it is contended, are appropriate to a case where the evidence falls short of proving the pleaded case, but are quite inappropriate to a case where the plaintiff's evidence is rejected and that of the defendant is preferred. In support of this we were referred to the decision in *Westgate* v. *Crowe*,[24] where the evidence adduced for the plaintiff in an action for personal injuries showed clearly that the liability was not that of the defendant, but of another party not before the court, and it was held that a non-suit was not the appropriate remedy, but that the defendant was entitled to judgment.

In our judgment this argument, though attractive, is fallacious. This is not a case like *Westgate* v. *Crowe*,[24] where the evidence showed that in no circumstances could the defendant be liable. Here, as we understand the view of the judge, the plaintiff might yet be able to succeed against the defendants if his claim were framed in a different way. But even if it were framed in a different way, it would still be a claim against the defendants for damages for wrongful dismissal—that is to say, this is not a case in which any other possible claim would be an entirely different cause of action. We do not think that the argument based on the wording of the rule is sound, for the words used are, in our judgment, wide enough to cover any case in which the evidence is held not to prove the claim, whether because it is of itself insufficient, or because it is rejected in favour of the defendants' evidence. In this connection it may

[24] [1908] 1 K.B. 24.

perhaps be remarked, by way of illustration, that the form of decree in a matrimonial cause, whereby it is pronounced "that "the petitioner has sufficiently proved the contents of the said "petition," is the same whether the cause be undefended or defended. We do not see how *Davis* v. *Hardy* [25] could have been decided as it was, unless it was regarded as competent for the court to non-suit a plaintiff where his evidence was rejected on the strength of that called for the defendant. Moreover, we find it difficult to reconcile the argument for the defendants with the decision of the Divisional Court in *National Cash Register* v. *Stanley*,[26] to which we were referred by counsel for the plaintiff. In that case the plaintiffs brought a default summons against the defendant in the county court for an alleged debt incurred owing to the defendant's refusal to accept delivery of a cash register under a hire-purchase agreement. The deputy county court judge held that on the evidence no debt was proved, but that the plaintiffs' remedy, if they had one, was by way of an action for damages. He is reported as having said [27]: "As the plain-"tiffs have chosen to proceed by default summons they cannot "obtain damages in this action, but there is no reason why they "should not do so in a fresh action properly constituted. I "think the proper course is to enter a non-suit." On appeal to the Divisional Court it was held by Lush J. and Sankey J. that the judge was right and that his judgment should be affirmed.

In these circumstances we find ourselves unable to accept the second submission put forward on behalf of the defendants, or to say that Order 23, r. 3, has no application to a situation such as arose in the present case. In our judgment this case is within the rule, and it was a matter for the discretion of the county court judge whether he should non-suit the plaintiff or give judgment for the defendants.

It remains, therefore, to consider the defendants' third submission, namely, that, assuming the rule to apply, the judge failed to exercise his discretion judicially having regard to all the circumstances of the case. It is on this point that in our judgment the judge's order is open to attack. It is not unimportant to observe that the plaintiff here was not without legal advice. He had the advantage of counsel and solicitors not only in presenting the case in court, but also in preparing the particulars of claim. This is not a case of an unassisted litigant who, through ignorance, may perhaps plead his case the wrong way or fail to produce all the necessary evidence in support. We apprehend that it was largely with a view to assisting such persons that the power to enter a non-suit was preserved in the county court after its abolition in the High Court.

In our view the judge's exercise of discretion in this case was open to criticism in two ways. First, he appears to have arrived

[25] 6 B. & C. 225.
[26] [1921] 3 K.B. 292.
[27] Ibid. 293.

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at his decision to non-suit the plaintiff without hearing counsel on either side. The possibility of a non-suit was not discussed in argument and, as we were informed, the order which the judge made took counsel on both sides completely by surprise. We do not think it is a judicial exercise of discretion to make an order of this kind without giving the parties affected an opportunity of being heard.

An even more serious criticism, in our view, is that the judge non-suited the plaintiff—thereby giving him the opportunity of bringing fresh proceedings against the defendants—after he had already specifically drawn attention to the state of the plaintiff's pleaded case, and had invited counsel for the plaintiff to consider whether any amendment was desired. The plaintiff has, therefore, already had his chance of putting forward his claim against the defendants in the alternative way, and—not in ignorance, or hastily, but deliberately through his counsel—has elected not to take advantage of the opportunity already afforded to him. To give him a second chance now, thereby enabling him to harass the defendants by instituting fresh proceedings, would, in our judgment, be a grave injustice to the defendants in the circumstances of this case. It seems to us that much the same considerations apply to the question that arises in this case as apply when an application is made to this court for leave to amend a party's pleading, when that party has already been offered, and has refused, an opportunity of doing so in the court below. Such an application is not readily granted; and for similar reasons we do not think that a plaintiff should readily be granted the concession of a non-suit, when he has already had his chance to frame his case in an alternative way. In either case, as it seems to us, the overriding consideration is that in the public interest there should be an end to litigation.

For these reasons, although the defendants have failed to satisfy us that under the rule it was not competent for the judge to non-suit the plaintiff, they are, in our judgment, entitled to succeed on this appeal on the ground that in the circumstances of this case he failed to exercise his discretion judicially by doing so. The appeal must therefore be allowed.

We cannot leave this case, however, without venturing to offer the suggestion that consideration might well be given to the desirability of abolishing the power to non-suit in the county court, as it has been abolished in the High Court. Non-suit was a remedy suitable enough in an age when the plaintiff won or lost his case according to the way in which it was pleaded, and when no right of amendment existed such as exists today. Bearing in mind the right of discontinuance which is conferred by Order 18, and the abundant facilities for amendment provided under Order 15 of the County Court Rules, we find it difficult to appreciate what object is served by preserving in the county

court today the old common law remedy of non-suit, which we venture to think few practitioners of today fully understand.

Appeal allowed with costs.

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A. W. G.

END OF VOLUME 2.

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